No. 17-340	
Title:	**New Prime Inc., Petitioner** **v.** **Dominic Oliveira**
Docketed:	September 6, 2017
Linked with 18A99	
Lower Ct:	United States Court of Appeals for the First Circuit
Case Numbers:	(15-2384)
Decision Date:	May 12, 2017
Rehearing Denied:	June 27, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Sep 06 2017	Petition for a writ of certiorari filed. (Response due October 6, 2017)
Sep 21 2017	Order extending time to file response to petition to and including November 6, 2017.
Oct 06 2017	Brief amicus curiae of American Trucking Associations, Inc. filed.
Oct 06 2017	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Oct 27 2017	Order further extending time to file response to petition to and including November 20, 2017.
Nov 20 2017	Brief of respondent Dominic Oliveira in opposition filed. **Main Document** **Proof of Service**
Dec 01 2017	Reply of petitioner New Prime Inc. filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Dec 06 2017	DISTRIBUTED for Conference of 1/5/2018.
Jan 04 2018	Rescheduled.

Jan 08 2018	DISTRIBUTED for Conference of 1/12/2018.
Jan 16 2018	DISTRIBUTED for Conference of 1/19/2018.
Feb 05 2018	DISTRIBUTED for Conference of 2/16/2018.
Feb 20 2018	DISTRIBUTED for Conference of 2/23/2018.
Feb 26 2018	Petition GRANTED.
Mar 06 2018	Motion for an extension of time filed. **Main Document**
Mar 09 2018	Motion to extend the time to file (the joint appendix and petitioner's brief on the merits) granted and the time is extended to and including May 14, 2018. The time to file respondent's brief on the merits is extended to and including July 11, 2018.
May 14 2018	Brief of petitioner New Prime Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
May 14 2018	Joint appendix filed. (Statement of cost filed). **Main Document** **Proof of Service**
May 21 2018	Brief amicus curiae of Cato Institute filed. **Main Document** **Certificate of Word Count** **Proof of Service**
May 21 2018	Brief amicus curiae of New England Legal Foundation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
May 21 2018	Brief amicus curiae of American Trucking Associations, Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
May 21 2018	Brief amicus curiae of Customized Logistics and Delivery Association filed. **Main Document** **Certificate of Word Count** **Proof of Service**
May 21 2018	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 08 2018	Motion for a further extension of time filed. **Main Document**

Jun 20 2018	Motion for a further extension of time to file respondent's brief on the merits granted, and the time is extended to and including July 18, 2018.
Jul 09 2018	SET FOR ARGUMENT On Wednesday, October 3, 2018
Jul 18 2018	Brief of respondent Dominic Oliveira filed. **Main Document** **Other** **Certificate of Word Count** **Proof of Service**
Jul 20 2018	Motion of New Prime, Inc. for an extension of time not accepted for filing. (July 24, 2018)
Jul 24 2018	Brief amicus curiae of American Association for Justice filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 24 2018	Brief amicus curiae of Public Citizen, Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 25 2018	Brief amicus curiae of Sen. Sheldon Whitehouse filed. **Certificate of Word Count** **Proof of Service** **Main Document**
Jul 25 2018	Brief amici curiae of Historians filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 25 2018	Brief amicus curiae of Constitutional Accountability Center filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Jul 25 2018	Brief amici curiae of Massachusetts, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 25 2018	Brief amicus curiae of Employment Law Scholars filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 25 2018	Brief amicus curiae of Owner-Operator Independent Drivers Association, Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 25 2018	Brief amici curiae of International Brotherhood of Teamsters, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 25 2018	Brief amici curiae of Statutory Construction Scholars filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 25 2018	Application (18A99) to extend the time to file a reply brief on the merits from August 17, 2018 to August 24, 2018, submitted to Justice Breyer.

	Main Document **Proof of Service**
Jul 25 2018	Brief amici curiae of Steve Viscelli, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 30 2018	Application (18A99) granted by Justice Breyer extending the time to file petitioner's reply brief on the merits to and including August 24, 2018.
Aug 03 2018	CIRCULATED
Aug 07 2018	Record requested from the U.S.C.A. 1st Circuit.
Aug 08 2018	Record for the U.S.C.A. 1st Circuit is electronic and located on PACER.
Aug 14 2018	Record received from U.S.C.A. 1st Circuit. 1 envelope.
Aug 22 2018	Reply of petitioner New Prime, Inc. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 03 2018	Argued. For petitioner: Theodore J. Boutrous, Jr., Los Angeles, Cal. For respondent: Jennifer D. Bennett, Oakland, Cal.

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RECORD AND BRIEFS

17-340

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States

NEW PRIME INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 1 of the Federal Arbitration Act ("FAA") provides that the FAA does not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Respondent is an independent contractor whose agreement with interstate trucking company New Prime, Inc. ("Prime") includes a mandatory arbitration provision requiring Respondent to arbitrate all workplace disputes with Prime on an individual basis. Respondent does not challenge the validity of the arbitration agreement he signed or the delegation clause contained therein, which mandates that all disputes regarding arbitrability be decided by an arbitrator. Nonetheless, Respondent filed a putative class action in court and opposed arbitration on the basis of the Section 1 exemption.

The questions presented are:

1. Whether a dispute over applicability of the FAA's Section 1 exemption is an arbitrability issue that must be resolved in arbitration pursuant to a valid delegation clause.

2. Whether the FAA's Section 1 exemption, which applies on its face only to "contracts of employment," is inapplicable to independent contractor agreements.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that petitioner New Prime Inc. has no parent corporation and no publicly held corporation owns ten percent (10%) or more of its stock. New Prime, Inc. is a privately owned company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner New Prime Inc. respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 857 F. 3d 7 (1st Cir. 2017). Pet. App. 1a. The court of appeals' order denying rehearing and rehearing en banc has not been published. Pet. App. 41a. The order of the district court is available at 141 F. Supp. 3d 125 (D. Mass. 2015). Pet. App. 44a.

JURISDICTION

The court of appeals filed its opinion on May 15, 2017, and denied a timely petition for rehearing and rehearing en banc on June 27, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act, 9 U.S.C. § 1, provides, in relevant part:

> [N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

STATEMENT

This Court has repeatedly underscored the "emphatic federal policy in favor of arbitral dispute resolution" that is embodied in the Federal Arbitration Act ("FAA"). *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985); *see also Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S.

Ct. 1421, 1425 (2017); *DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463, 466 (2015); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011). As a matter of substantive federal law, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

Moreover, this Court has repeatedly instructed lower courts to enforce arbitration agreements containing class waivers, as it is up to the parties to determine the manner of arbitration in which they wish to engage. *See Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) ("Consistent with th[e] text" of the FAA, "courts must rigorously enforce arbitration agreements according to their terms . . . , including terms that specify with whom the parties choose to arbitrate their disputes . . . ." (citation omitted)); *Concepcion*, 563 U.S. at 351 ("Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations.").

The decision below reflects the latest effort by a lower court to avoid these dictates and invalidate an arbitration agreement containing a class waiver—a tactic with which this Court is all too familiar. *See, e.g.*, *Epic Sys. Corp. v. Lewis*, Case No. 16-285; *Ernst & Young LLP v. Morris*, Case No. 16-300; *Nat'l Labor Relations Bd. v. Murphy Oil USA, Inc.*, Case No. 16-307 (all scheduled for oral argument on October 2, 2017). This time, the feat was accomplished through a nonsensical interpretation of the FAA itself.

Section 1 of the FAA exempts a narrow class of transportation workers from the purview of the statute—those who have signed "contracts of employment." 9 U.S.C. § 1. This Court has instructed that the Section 1 exemption must be given a "precise

reading" and "a narrow construction," in order to ensure the FAA accomplishes its purpose of "overcom[ing] judicial hostility to arbitration agreements." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118-19 (2001) (citation omitted).

The First Circuit did the opposite. It read the Section 1 exemption expansively and effectively eliminated arbitration as a viable means of dispute resolution for the entire transportation industry. According to the court of appeals, the term "contracts of employment" in Section 1 should be read to include contracts of *non*-employment—that is, independent contractor agreements—notwithstanding the plain language of Section 1 to the contrary. Pet. App. 30a. By expanding the Section 1 exemption beyond its textual limit and refusing to compel arbitration, the First Circuit violated *Circuit City*, created conflicts with the Eighth and Ninth Circuits and the California Court of Appeal, and made the First Circuit an outlier jurisdiction in conflict with more than a dozen district court decisions around the country.

This Court's review is warranted to resolve the conflicts between the First Circuit's decision and decisions of the Eighth and Ninth Circuits and the California Court of Appeal interpreting the same Section 1 exemption, and to ensure the FAA remains effective and is enforced uniformly nationwide.

1. Petitioner New Prime, Inc. ("Prime") is an interstate trucking company that engages both company drivers and independent contractors to operate its vehicles. Respondent Dominic Oliveira is a former Prime driver who decided to become an independent contractor. In two separate Independent Contractor Operating Agreements, Oliveira (on behalf of his LLC, Hallmark Trucking Company) and Prime

agreed "that the intent of this Agreement is to establish an independent contractor relationship at all times." Pet. App. 64a; *id.* at 86a. They also agreed that "any disputes arising out of or relating to the relationship created by the agreement, and any disputes as to the rights and obligations of the parties, including the arbitrability of disputes between the parties, shall be fully resolved by arbitration in accordance with Missouri's Arbitration Act and/or the Federal Arbitration Act." Pet. App. 82a; *id.* at 103-104a; Pet. App. 115a-16a.

Respondent subsequently filed a putative class action against Prime, alleging claims for unpaid wages, misclassification as an independent contractor, and breach of contract. Prime moved to compel arbitration under the FAA. Although Respondent does not dispute the validity of the arbitration provisions or that they cover his claims against Prime, he argues that he should nonetheless be permitted to proceed in court on the basis that the contracts are exempt from enforcement under Section 1 of the FAA.

2. The district court denied Prime's motion to compel arbitration. It determined that the question whether the Section 1 exemption applies to the parties' contracts is a threshold issue for the court, and that the parties cannot delegate this issue to an arbitrator. The district court acknowledged that Section 1's reference to "contracts of employment" refers to employer-employee arrangements only, not independent-contractor agreements, explaining that "[t]his construction comports well" with the FAA's purpose and this Court's decision in *Circuit City*. Pet. App. 52a. But because the contract terms and existing factual record did not, in the district court's

view, make clear whether Prime and Respondent established an employer-employee or independent-contractor relationship, the district court ordered discovery on that question before determining whether the Section 1 exemption applies.

Prime appealed the district court's order denying the motion to compel arbitration under 9 U.S.C. § 16.

3. The First Circuit affirmed. The court held that applicability of the Section 1 exemption must be resolved by a court, even in the presence of an indisputably valid delegation clause. Pet. App. 35a. The court acknowledged that the Eighth Circuit had reached the opposite conclusion on the same question, holding that "'application of the FAA's transportation worker exemption is a threshold question of arbitrability.'" Pet. App. 11a (quoting *Green v. SuperShuttle, Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011)). Nevertheless, the court held that the district court must resolve the FAA Section 1 question before deciding whether to compel the parties to arbitration. Pet. App. 16a.

Two members of the panel went further, holding (contrary to the district court) that the term "contracts of employment" for purposes of Section 1 includes "transportation-worker agreements that establish or purport to establish independent-contractor relationships." Pet. App. 35a. Thus, the First Circuit's ruling removed *all* transportation workers from the ambit of the FAA, whether employees or independent contractors. The panel majority acknowledged that "the weight of district-court authority to consider the issue has concluded that the § 1 exemption does not extend to contracts that establish or purport to establish an independent-contractor relationship." Pet. App. 21a. And, in a

footnote, the panel majority conceded that the Ninth Circuit has also embraced that interpretation. Pet. App. 21a (quoting *In re Swift Transp. Co.*, 830 F.3d 913 (9th Cir. 2016) ("*Van Dusen III*")). But the panel majority disagreed with all of those courts, including the district court below, based on its broad interpretation of the term "contracts of employment."

Judge Barbadoro, sitting by designation, dissented from the second part of the panel's decision. Pet. App. 35a.

4. New Prime petitioned for rehearing and rehearing en banc, but the First Circuit denied the petition. Pet. App. 41a-42a.

REASONS FOR GRANTING THE PETITION

The First Circuit's decision deepens the divisions among the federal courts of appeals on important questions of law regarding the scope and applicability of the exemption contained in Section 1 of the FAA. *See* Sup. Ct. R. 10(a). First, the First Circuit's holding that applicability of the Section 1 exemption must be decided by a court (rather than an arbitrator), notwithstanding the parties' valid delegation clause, exacerbates a preexisting split between the Eighth and Ninth Circuits. Second, in holding that the Section 1 exemption applies to independent contractors as well as to employees, the First Circuit created a new conflict among the circuit courts and became an outlier jurisdiction.

This Court's review is required to establish uniform, national rules for these important questions of FAA interpretation. Without the ability to include enforceable arbitration provisions in contracts governing independent contractors, the entire transportation industry will be relegated to resolving all dis-

putes arising out of such contracts in court, notwithstanding the contrary intentions of the parties. This directly undercuts the principal advantages and efficiencies of arbitration, the importance of which this Court has repeatedly recognized, and contradicts the primary purpose of the FAA.

I. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUIT COURTS, DISTRICT COURTS, AND STATE APPELLATE COURTS.

Both of the First Circuit's holdings—(1) that courts must resolve the Section 1 exemption issue notwithstanding a valid delegation clause, and (2) that the Section 1 exemption applies to independent contractors—are in conflict with other courts around the nation, including decisions from the Eighth and Ninth Circuits and the California Court of Appeal. This Court's review is required to resolve these conflicts.

A. It is undisputed that the parties' arbitration agreement contains a valid delegation clause, stating that all issues of arbitrability must be resolved by the arbitrator. Pet. App. 55a (district court, finding that "the parties do not contest that the two operating agreements Oliveira signed . . . contain valid delegation provisions," which encompass "the arbitrability of disputes between the parties"). Moreover, there is no question that the arbitration agreements incorporate the American Arbitration Association's ("AAA's") rules, App. 102, 112, which expressly grant the arbitrator authority to determine his or her own jurisdiction, *see AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). Thus, it is "clear and unmistakable" that the parties agreed to arbitrate *every* gateway issue in a potential dispute. *Ibid.* Nevertheless, the First Circuit held that ap-

plicability of the Section 1 exemption—unique among all threshold issues of arbitrability—must be decided by a court and not an arbitrator. Pet. App. 35a.

That holding is in direct conflict with the Eighth Circuit's decision in *Green v. SuperShuttle, Int'l, Inc.*, 653 F.3d 766 (8th Cir. 2011), which held that application of the Section 1 exemption "is a threshold question of arbitrability" like any other. *Id.* at 769. There, like here, the contract "specifically incorporated" the AAA rules, which means that the parties "agreed to allow the arbitrator to determine threshold questions of arbitrability." *Ibid.* Thus, the Eighth Circuit held that the parties had agreed to submit *all* gateway questions of arbitrability to the arbitrator, including "whether the FAA's transportation worker exemption applied." *Ibid.*

The First Circuit's decision on this issue exacerbates a preexisting circuit split between the Eighth and Ninth Circuits. In *In re Van Dusen*, 654 F.3d 838 (9th Cir. 2011) ("*Van Dusen I*"), the Ninth Circuit held that a district court is required to assess whether the Section 1 exemption applies before ordering arbitration. *Id.* at 843. Thus, the decision below sides with the Ninth Circuit and against the Eighth Circuit.

This Court's review is warranted to resolve this split of authority.

B. More egregious is the First Circuit's holding that the FAA Section 1 exemption applies to independent contractors as well as employees. Pet. App. 35a. On this issue, the decision below breaks with the Ninth Circuit and conflicts with decisions of the California Court of Appeal and more than a dozen district courts around the country. Indeed, prior to the First Circuit's opinion in this case, courts uni-

formly understood the phrase "contracts of employment" in Section 1 to mean what it says: a contract between an employer and an employee—not an agreement with an independent contractor.

In *Van Dusen III*, 830 F.3d 913 (9th Cir. 2016), each of the Ninth Circuit panel members wrote separately to address the Section 1 exemption. Notwithstanding the splintered decision, all three panel members agreed that applicability of the Section 1 exemption turns on whether the plaintiff is an employee or independent contractor—they disagreed only with respect to the type of evidence on which the parties could rely in proving one or the other. *See id.* at 915 (per curiam) (denying writ of mandamus and allowing district court to proceed with discovery and a trial to determine whether plaintiff was an employee or independent contractor); *id.* at 920 (Ikuta, J., dissenting) ("Determining whether a contract qualifies as a 'contract of employment' requires a categorical approach that focuses solely on the words of the contract and the definition of the relevant category."); *id.* at 918 (Hurwitz, J., concurring) (explaining that if the case were a direct appeal, rather than a mandamus action, he "might agree" with the position "Judge Ikuta persuasively argues").

That same evidentiary debate is at issue in this case—Prime has argued throughout the lower court proceedings that the determination of Section 1 exemption applicability should be made (by an arbitrator) based solely on the words of the contract between the parties, whereas Oliveira has argued (and the district court agreed) that discovery is required to determine whether Oliveira is properly classified as an employee or independent contractor. Pet App. 61a. Yet the First Circuit's ruling rendered this en-

tire debate academic because, under that court's view, it does not matter whether the worker is an employee or an independent contractor—either way, the worker falls within the Section 1 exemption. Thus, the decision below is in direct conflict with the unanimous view of the Ninth Circuit *Van Dusen III* panel.

The California Court of Appeal also has held that applicability of the Section 1 exemption turns on whether the plaintiff is an employee or independent contractor. *See Performance Team Freight Sys., Inc. v. Aleman*, 241 Cal. App. 4th 1233 (Cal. Ct. App. 2015). As that court explained, "agreements characterizing truck drivers as independent contractors . . . should not be deemed 'contracts of employment' unless the party opposing arbitration demonstrates that they are such." *Id.* at 1241. Thus, in determining whether the Section 1 exemption applies, "[t]he question [is] whether a worker is an independent contractor or an employee[.]" *Id.* at 1242 (quoting *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341, 349 (Cal. 1989)). The First Circuit's decision is in direct conflict with that ruling as well.

In addition to departing from these appellate decisions, the First Circuit's ruling in this case conflicts with the unanimous decisions of more than a dozen district courts from around the country, all of which have held that independent contractor agreements are not "contracts of employment" for Section 1 purposes. *See, e.g.*, *Zambrano v. Strategic Delivery Sols., LLC*, 2016 WL 5339552, at *3 (S.D.N.Y. Sept. 22, 2016); *Diaz v. Mich. Logistics, Inc.*, 167 F. Supp. 3d 375, 380 (E.D.N.Y. 2016); *Aviles v. Quik Pick Express, LLC*, 2015 WL 5601824, at *6 (C.D. Cal. Sept.

23, 2015); *Morning Star Assocs., Inc. v. Unishippers Glob. Logistics, LLC*, 2015 WL 2408477, at *5 (S.D. Ga. May 20, 2015); *Doe v. Swift Transp. Co.*, 2015 WL 274092, at *3 (D. Ariz. Jan. 22, 2015); *Alvarado v. Pac. Motor Trucking Co.*, 2014 WL 3888184, at *4-5 (C.D. Cal. Aug. 7, 2014); *Villalpando v. Transguard Ins. Co. of Am.*, 17 F. Supp. 3d 969, 982 (N.D. Cal. 2014); *Carney v. JNJ Exp., Inc.*, 10 F. Supp. 3d 848, 852 (W.D. Tenn. 2014); *Port Drivers Fed. 18, Inc. v. All Saints*, 757 F. Supp. 2d 463, 472 (D.N.J. 2011); *Davis v. Larson Moving & Storage Co.*, 2008 WL 4755835, at *4 (D. Minn. Oct. 27, 2008); *Owner-Operator Indep. Drivers Ass'n v. United Van Lines, LLC*, 2006 WL 5003366, at *3 (E.D. Mo. Nov. 15, 2006); *Owner-Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co.*, 288 F. Supp. 2d 1033, 1035 (D. Ariz. 2003); *Roadway Package Sys., Inc. v. Kayser*, 1999 WL 817724, at *4 n.4 (E.D. Pa. Oct. 13, 1999).

The First Circuit is now a lone outlier on the scope of the Section 1 exemption. This Court's review is warranted to resolve this conflict as well.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT.

This Court's review is also warranted because the First Circuit's decision—which prevents an arbitrator from deciding an arbitrability issue under the FAA notwithstanding the parties' agreement to the contrary, and interprets the Section 1 exemption expansively to exempt the entire transportation industry from arbitration—is in direct conflict with this Court's precedents regarding both the Section 1 exemption and the FAA more broadly.

A. With respect to the delegation clause issue—*i.e.*, whether an arbitrator should decide if the Section 1 exemption applies—this Court has explained

that delegation clauses are simply "additional, antecedent agreement[s]" to arbitrate that must be enforced the same as any other arbitration agreement. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010). This Court's FAA jurisprudence has also commanded, over and over again, that "*any doubts* concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (emphasis added); *see also Volt Info. Scis., Inc. v. Bd. of Trustees*, 489 U.S. 468, 489 (1989); *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986). The FAA must be interpreted against the background principle that a bargained-for arbitration agreement is enforceable so long as the agreement is "susceptible of an interpretation that covers the asserted dispute." *AT&T Techs.*, 475 U.S. at 650. This exacting standard is necessary because courts must pay "due regard" to the liberal "federal policy favoring arbitration." *DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (citation omitted); *see also Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 338 (2011).

Indeed, the "overarching purpose" of the FAA is "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," *Concepcion*, 563 U.S. at 344, in order to "revers[e] centuries of judicial hostility to arbitration agreements," *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 225 (1987) (citation omitted). As a result, this Court has repeatedly ruled that "courts must 'rigorously enforce' arbitration agreements"—including delegation clauses—"according to their terms." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (quot-

ing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)); *see also, e.g.*, *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985); *Moses H. Cone*, 460 U.S. at 25.

The First Circuit's decision in this case flouts these commands, ordering courts to decide an important arbitrability issue notwithstanding the parties' express agreement that an arbitrator should resolve the issue.

B. With respect to the scope of the Section 1 exemption—*i.e.*, whether "contracts of employment" include independent contractor agreements—this Court has held that the FAA "compel[s]" giving the Section 1 exemption "a narrow construction" and a "precise reading." *Circuit City*, 532 U.S. 105, 118, 119 (2001). That is because "the provision is contained in a statute that 'seeks broadly to overcome judicial hostility to arbitration agreements.'" *Ibid.* (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272-73 (1995)).

In *Circuit City*, this Court explained that the Section 1 exemption is limited to certain categories of workers who are tied together by the common features of *transportation* and *employment*:

> By the time the FAA was passed, Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their ***employers***, see Shipping Commissioners Act of 1872, 17 Stat. 262. When the FAA was adopted, moreover, grievance procedures existed for railroad ***employees*** under federal law, see Transportation Act of 1920, §§ 300-316, 41 Stat. 456 . . . . [And] legislation was soon to follow, with the

> amendment of the Railway Labor Act in 1936 to include air carriers and their ***employees***.

Circuit City, 532 U.S. at 121 (emphases added). These limitations make sense, this Court explained, because the purpose of Section 1 is to avoid conflicts with other federal statutes that provide their own alternative dispute-resolution mechanisms for certain kinds of employees, such as "seamen," "railroad employees," and "air carriers and their employees." *Id.* at 120-21.

Those other federal statutes do not reach independent contractors, and therefore it would have made little sense for Congress to have included independent contractors in Section 1's exemption provision. *See Circuit City*, 532 U.S. at 121 (citing the Shipping Commissioners Act of 1872, 17 Stat. 262; Transportation Act of 1920, 41 Stat. 456; and Railway Labor Act of 1926, 44 Stat. 577); *see also* Railway Labor Act of 1926, § 1, Pub. L. No. 69-257, 44 Stat. 577 ("[t]he term 'employee' as used herein includes every person in the service of a carrier (*subject to its continuing authority to supervise and direct the manner of rendition of his service*) who performs any work defined as that of an employee or subordinate official") (emphasis added); Federal Employers' Liability Act, 45 U.S.C. § 51 (enacted 1908) (applies only to "employee[s]" who are injured "while . . . employed by" a "common carrier by railroad"); Jones Act, 46 U.S.C. § 30104 (formerly codified at 46 U.S.C. § 688) (enacted 1920) ("[a] seaman injured in the course of *employment* . . . may elect to bring a civil action at law . . . against the *employer*") (emphasis added).

As a result, this Court held in *Circuit City* that "Section 1 exempts from the FAA only contracts of ***employment*** of transportation workers," rejecting any

"expansive construction of the FAA's exclusion provision that goes beyond the meaning of the words Congress used." 532 U.S. at 119 (emphasis added); *see also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 319-21 (1992) (when Congress uses the term "employee" in a statute without "defin[ing] it," Congress means "to incorporate traditional agency law criteria for identifying master-servant relationships"); *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989) (same).

The Court also interpreted the Section 1 exemption narrowly in its only other case examining that provision. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court concluded that the term "contracts of employment" does not include agreements mandating that an employee arbitrate employment-related disputes with his employer if the employer is not a party to the contract. *Id.* at 25 n.2. Taken together, *Circuit City* and *Gilmer* leave no doubt that the Section 1 exemption, and the term "contracts of employment" appearing therein, must not be interpreted any more broadly than is absolutely necessary, always keeping in mind that the overriding purpose of the FAA is to foster and support arbitration.

The First Circuit's contra-textual reading of "contracts of employment" in Section 1 to include contracts of *non*-employment (*i.e.*, independent-contractor agreements) contradicts this Court's clear commands regarding interpretation of the very same provision, as well as this Court's repeated recognition of "the common understanding . . . of the difference between an employee and an independent contractor." *Darden*, 503 U.S. at 327. Indeed, the court of appeals acknowledged that *Black's Law Dictionary*

treats "contract of employment" as synonymous with "employment contract," the first usage of which was in 1927, and defines the term in the commonsense way to mean a "contract between an employer and employee in which the terms and conditions of employment are stated." Pet. App. 26a (quoting *Black's Law Dictionary* (10th ed. 2014)).

That should have been the end of the First Circuit's inquiry. Yet the court sought out all manner of other sources from contexts beyond the FAA in an effort to shoehorn independent-contractor agreements into the term "contracts of employment." Op. 27-31. That is the antithesis of the approach this Court has mandated.

III. The First Circuit's Decision Has Sweeping Implications For The Transportation Industry.

The decision below makes the First Circuit an outlier on an issue of national importance: The efficient resolution of disputes between companies and independent contractors in the national and international transportation industry. Without this Court's review, *no* dispute arising out of *any* working relationship in the entire transportation sector could ever be compelled to arbitration under the FAA within the First Circuit—no matter how explicit a mutual agreement to the contrary. As the dissenting judge warned (Pet. App. 37a), the First Circuit's categorical ruling leads to significant "over- and under-inclusiveness concerns"—the opposite result one should expect when applying a provision of the FAA that must be interpreted with "precis[ion]." *Circuit City*, 532 U.S. at 118-19.

Independent contractors have long played a critical role in the trucking industry. *See Am. Trucking*

Ass'ns, Inc. v. United States, 344 U.S. 298, 303 (1953) ("Carriers . . . have increasingly turned to owner-operator truckers to satisfy their need for equipment as their service demands."). Without the ability to include enforceable arbitration provisions in the contracts governing independent contractors, this entire industry will be relegated to resolving all disputes arising out of working relationships in court, thereby undercutting the "principal advantage of arbitration—its informality," and "mak[ing] the process slower [and] more costly." *Concepcion*, 563 U.S. at 348; *see also, e.g., id.* at 344 ("The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute."); *Italian Colors*, 133 S. Ct. at 2312 (rejecting an interpretation of the FAA that would "sacrifice[] the principal advantage of arbitration" (citation omitted)); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010) ("benefits of private dispute resolution" include "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes").

This outcome could not be more at odds with the FAA's insistence that courts honor parties' agreements to arbitrate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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September 1, 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

DOMINIC OLIVEIRA, on his behalf and on behalf of all others similarly situated *Plaintiff-Appellee*, v. NEW PRIME, INC., *Defendant-Appellant*.	No. 15-2364

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Patti B. Saris, U.S. District Judge]

Before

Thompson and Kayatta, Circuit Judges,
and Barbadoro,* District Judge.

Theodore J. Boutrous, Jr., with whom Joshua S. Lipshutz, Jason C. Schwartz, Thomas M. Johnson, Jr., Lindsay S. See, Gibson, Dunn & Crutcher LLP,

* Of the District of New Hampshire, sitting by designation.

William E. Quirk, James C. Sullivan, Robert J. Hingula, Polsinelli PC, Judith A. Leggett, and Leggett Law Firm, P.C. were on brief, for appellant.

Jennifer D. Bennett, with whom Public Justice, P.C., Hillary Schwab, Fair Work, P.C., Andrew Schmidt, and Andrew Schmidt Law, PLLC were on brief, for appellee.

Richard Frankel on brief for amicus curiae in support of appellee.

May 12, 2017

THOMPSON, Circuit Judge. This case raises two questions of first impression in this circuit. First, when a federal district court is confronted with a motion to compel arbitration under the Federal Arbitration Act (FAA or Act), 9 U.S.C. §§ 1-16, in a case where the parties have delegated questions of arbitrability to the arbitrator, must the court first determine whether the FAA applies or must it grant the motion and let the arbitrator determine the applicability of the Act? We hold that the applicability of the FAA is a threshold question for the court to determine before compelling arbitration under the Act. Second, we must decide whether a provision of the FAA that exempts contracts of employment of transportation workers from the Act's coverage, see id. § 1 (the § 1 exemption), applies to a transportation-worker agreement that establishes or purports to establish an independent-contractor relationship. We answer this question in the affirmative. Accordingly, we affirm the

district court's order denying the motion to compel arbitration and dismiss this appeal for lack of appellate jurisdiction.

Background[1]

The defendant, New Prime, Inc. (Prime), operates an interstate trucking company. Under its Student Truck Driver Program (apprenticeship program), Prime recruits and trains new drivers. Prime touts its program as offering "[p]aid [a]pprenticeship [Commercial Driver's License (CDL)] [t]raining." After attending a four-day orientation, student drivers hit the road with a Prime truck driver, who acts as an on-the-job instructor. In this phase of the apprenticeship program, student drivers must log 10,000 miles as a driver or passenger, and, apart from an advance of $200 per week for food (which eventually must be repaid), the apprentices are not paid.[2] After completing

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[1] Because the motion to compel arbitration was made in connection with a motion to dismiss or stay, we glean the relevant facts from the operative complaint and the documents submitted to the district court in support of the motion. See Gove v. Career Sys. Dev. Corp., 689 F.3d 1, 2 (1st Cir. 2012).

[2] This arrangement allows Prime to transport its shipments in a more economical and efficient manner. Under United States Department of Transportation regulations, a truck driver's "[o]n-duty time" includes "[a]ll driving time" as well as a host of other non-driving tasks, including time spent supervising a student driver who is behind the wheel. 49 C.F.R. § 395.2.In any fourteen-hour period of on-duty time, a truck driver has only eleven hours of driving time. Id. § 395.3(a)(2)-(3)(i). After a Prime instructor driver has maxed out his or her eleven hours of driving time, the instructor driver still has three more hours of on-duty time remaining. Thus, once an instructor driver has exhausted his or her own driving time, a student driver can drive the truck toward its ultimate destination for up to three more hours, and

the supervised-driving period, the student driver takes the examination for a CDL and then must drive 30,000 more miles as a B2 company driver trainee (B2 trainee). Prime pays its B2 trainees fourteen cents per mile. At the conclusion of the B2 trainee portion of the apprenticeship program, the apprentices attend the district court in support of the motion. See Gove v. Career Sys. Dev. Corp., 689 F.3d 1, 2 (1st Cir. 2012). additional orientation classes for approximately one week. Apprentices are not paid for time spent in this orientation.

The plaintiff, Dominic Oliveira, is an alum of Prime's apprenticeship program. He was not paid for the time he spent in orientation and was paid on a per-mile basis while driving as a B2 trainee, although Prime docked his pay during this period to recoup the $200 advances that it paid him during the supervised-driving period.

Drivers are relieved of paying tuition for the apprenticeship program as long as they remain with Prime for one year as either company drivers or independent contractors. After completing the program, drivers choose between the two options, and Prime offers a $100 bonus to those who elect independent- contractor status. When Oliveira finished the apprenticeship program, Prime representatives informed him that he would make more money as an independent contractor than a company driver. Prime directed Oliveira to Abacus Accounting (Abacus) — a company with offices on the second floor of Prime's building — to assist him in forming a limited liability company

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Prime does not pay the student driver for this bonus driving time.

(LLC). After Oliveira filled out a form provided by Abacus and listed his preferred LLC names, Abacus created Hallmark Trucking LLC (Hallmark) on Oliveira's behalf.

Prime then directed Oliveira to the offices of Success Leasing (Success) — located on the first floor of the same building — for help in securing a truck. After selecting a truck, Oliveira was informed that his first load of freight was ready to be trucked for Prime, and he was instructed to sign the highlighted portions of several documents before hitting the road. He hastily did so, and Prime then steered him towards its company store, where he purchased — on credit — $5,000 worth of truck equipment and fuel.

Among the documents Oliveira signed was an Independent Contractor Operating Agreement (the contract) between Prime and Hallmark.[3] The contract specified that the relationship between the parties was that "of carrier and independent contractor and not an employer/employee relationship" and that "[Oliveira is] and shall be deemed for all purposes to be an independent contractor, not an employee of Prime."[4] Additionally, under the contract, Oliveira retained the rights to provide transportation services to

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[3] Around ten months later, Hallmark and Prime executed another Independent Contractor Operating Agreement. Because the pertinent language of the two agreements is identical, we refer to them collectively as "the contract." When quoting the contract in this opinion, we omit any unnecessary capitalization.

[4] Although the contract was between Prime and Hallmark, Prime has — with one small exception discussed below, see note 15, infra — treated the contract as one between Prime and Oliveira. We similarly treat Oliveira and Hallmark interchangeably.

companies besides Prime,[5] refuse to haul any load offered by Prime, and determine his own driving times and delivery routes. The contract also obligated Oliveira to pay all operating and maintenance expenses, including taxes, incurred in connection with his use of the truck leased from Success. Finally, the contract contained an arbitration clause under which the parties agreed to arbitrate "any disputes arising under, arising out of or relating to [the contract], . . . including the arbitrability of disputes between the parties."[6]

Oliveira alleges that, during his Hallmark days, Prime exercised significant control over his work. According to Oliveira, Prime required him to transport Prime shipments, mandated that he complete Prime training courses and abide by its procedures, and controlled his schedule. Because of Prime's pervasive involvement in his trucking operation, Oliveira was unable to work for any other trucking or shipping companies.

Prime consistently shortchanged Oliveira during his time as an independent contractor. Eventually, Oliveira — frustrated and, he alleges, unlawfully underpaid — stopped driving for Prime. It was a short-lived separation, however; Prime rehired Oliveira a month later, this time as a company driver. Oliveira alleges that his job responsibilities as a company

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[5] Before he could drive for another carrier, however, Oliveira was contractually obligated to give Prime five days' advance notice and to "remove all identification devices, licenses and base plates from the [truck] and return [them] to Prime."

[6] The arbitration provision also specified that "arbitration between the parties will be governed by the Commercial Arbitration Rules of the American Arbitration Association [(AAA)]."

driver were "substantially identical" to those he had as an independent contractor. Job responsibilities were not the only constant; Oliveira's pay as a company driver was as paltry as ever.

Oliveira filed this class action against Prime, alleging that Prime violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219, as well as the Missouri minimum-wage statute, by failing to pay its truck drivers minimum wage. Oliveira also asserted a class claim for breach of contract or unjust enrichment and an individual claim for violation of Maine labor statutes. Prime moved to compel arbitration under the FAA and stay the proceedings or, alternatively, to dismiss the complaint for improper venue and the breach of contract/unjust enrichment count for failure to state a claim upon which relief may be granted.[7] In its motion, Prime asserted that "Oliveira . . . entered into an Independent Contractor Operating Agreement with . . . Prime . . . to work as an owner-operator truck driver." (Emphasis added.)

In response, Oliveira argued that, because he was not a party to the contract between Prime and Hallmark, he could not be personally bound by any of its provisions, including the arbitration clause. He further contended that the motion to compel arbitration should be denied because, among other reasons, the contract is exempted from the FAA under § 1. He also argued that the question of the applicability of the § 1 exemption was one for the court, and not an arbitrator, to decide.

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[7] Because the district court never addressed the alternative arguments for dismissal and Prime has not pressed them on appeal, we focus only on the motion to compel arbitration.

Prime disputed Oliveira's argument that he could not be personally bound by the contract between Prime and Hallmark, stating that "Oliveira and Hallmark Trucking are factually one and the same." Prime also took issue with both of Oliveira's other arguments, contending that the § 1 exemption does not include independent-contractor agreements and, in any event, the question of whether the § 1 exemption applies is a question of arbitrability that the parties had delegated to the arbitrator.[8]

The district court proceeded straight to the FAA issues and concluded that the question of the applicability of the § 1 exemption was for the court, and not an arbitrator, to decide. And it determined that it could not yet answer that question because (1) the "contracts of employment" language of the § 1 exemption does not extend to independent contractors; and (2) discovery was needed on the issue of whether Oliveira was a Prime employee or an independent contractor before the court could decide whether the contract was a contract of employment under the § 1 exemption.[9] The district court therefore denied Prime's motion to compel arbitration without prejudice and permitted the parties to conduct discovery on

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[8] The parties also squabbled over whether Oliveira's claims arising from periods of time in which the contract was not in effect — during Oliveira's pre-contract time in the apprenticeship program and his post-contract stint as a company driver — were arbitrable under the arbitration clause of the contract. The district court did not resolve the issue, electing instead to focus on the question of whether the § 1 exemption applied.

[9] The district court noted that the parties did not dispute that Oliveira, as a truck driver, was a transportation worker under the § 1 exemption.

Oliveira's employment status. Prime timely appealed.[10]

Analysis

The FAA lies at the center of the two questions raised by this appeal. Thus, before tackling those questions, we first briefly outline the statutory framework.

To combat deep-rooted judicial hostility towards arbitration agreements, Congress enacted the FAA in 1925. **See Circuit City Stores, Inc.** v. Adams, 532 U.S. 105, 111 (2001). Section 2 of the FAA enshrines the "liberal federal policy favoring arbitration agreements," **Moses H. Cone Mem'l Hosp.** v. **Mercury Constr. Corp.**, 460 U.S. 1, 24 (1983), by declaring that an arbitration agreement in "a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2.

And the FAA does not simply talk the talk. Instead, two separate provisions provide the bite to back up § 2's bark. **See Rent-A-Ctr., W., Inc.** v. Jackson, 561 U.S. 63, 70 (2010). First, under § 3, a party may obtain a stay of federal-court litigation pending arbitration. See 9 U.S.C. § 3. Second, § 4 authorizes district courts to grant motions to compel arbitration. See id. § 4.

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[10] Although interlocutory orders are ordinarily not immediately appealable, the FAA permits immediate appeal from an order denying a motion to compel arbitration. See 9 U.S.C. § 16(a)(1)(B); Gove, 689 F.3d at 3-4 n.1. We review the denial of a motion to compel arbitration de novo. Gove, 689 F.3d at 4.

The scope of the FAA, however, is not unbounded. Section 1 of the FAA provides that the Act shall not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Id. § 1. The Supreme Court has interpreted this section to "exempt[] from the FAA . . . contracts of employment of transportation workers." Circuit City, 532 U.S. at 119.

This case presents us with two questions pertaining to the § 1 exemption. We address each question in turn.

A. Who Decides Whether the § 1 Exemption Applies?

The question of whether the district court or the arbitrator decides the applicability of the § 1 exemption is one of first impression in this circuit. The parties champion dueling out-of-circuit precedent in support of their respective positions on this issue. Relying on the Eighth Circuit's decision in Green v. SuperShuttle International, Inc., 653 F.3d 766 (8th Cir. 2011), Prime argues that the question of whether the § 1 exemption applies is a question of arbitrability that must be decided by the arbitrator where, as here, the parties have delegated such questions to the arbitrator.

In Green, the plaintiffs, a class of shuttle-bus drivers, alleged that the defendant, a shuttle-bus company, misclassified the drivers as franchisees instead of classifying them as employees. 653 F.3d at 767-68. When the defendant moved under the FAA to compel arbitration pursuant to the arbitration clause contained in the parties' contracts, the plaintiffs countered that their contract was outside the scope of the

FAA by virtue of the § 1 exemption. Id. at 768. The Eighth Circuit upheld the district court's grant of the defendant's motion, concluding that "[a]pplication of the FAA's transportation worker exemption is a threshold question of arbitrability" in the parties' dispute. Id. at 769. Because the parties' agreements incorporated the AAA rules, which provide that the arbitrator has the power to determine his or her own jurisdiction, the court concluded that the parties agreed to allow the arbitrator to determine threshold questions of arbitrability, including the applicability of the § 1 exemption. Id.

With Green as its guide, Prime offers several reasons why the question of § 1's applicability is one for the arbitrator to determine, but each of these arguments flows from the Green court's characterization of this issue as a question of arbitrability. The case on which Oliveira relies — the Ninth Circuit's decision in In re Van Dusen, 654 F.3d 838 (9th Cir. 2011) — considered this characterization to be a flawed starting premise.

Van Dusen arose on facts strikingly similar to those in this case; the plaintiffs, interstate truck drivers, alleged that one of the defendants, a trucking company, misclassified its truck drivers as independent contractors to circumvent the requirements of the FLSA and parallel state laws. See id. at 840; see also Van Dusen v. Swift Transp. Co., 830 F.3d 893, 895 (9th Cir. 2016) (later appeal in same case). The defendant moved to compel arbitration under the FAA, and the plaintiffs opposed that motion, asserting that the § 1 exemption applied to their contracts. Van Dusen, 654 F.3d at 840. The district court ordered arbitration, concluding that the question of whether the

§ 1 exemption applied was one for the arbitrator to decide in the first instance. Id. After the district court refused the plaintiffs' request for certification of an interlocutory appeal, the plaintiffs sought mandamus relief before the Ninth Circuit. Id.

The Ninth Circuit ultimately declined to issue the extraordinary remedy of mandamus relief because the district court's conclusion was not clearly erroneous in light of the dearth of federal appellate authority addressing the issue and the general federal policy in favor of arbitration. Id. at 845-46. The court nonetheless outlined why "the best reading of the law requires the district court to assess whether [the §] 1 exemption applies before ordering arbitration" under the FAA. Id. at 846. The court explained that, because a district court's authority to compel arbitration under the FAA exists only where the Act applies, "a district court has no authority to compel arbitration under Section 4 [of the FAA] where Section 1 exempts the underlying contract from the FAA's provisions." Id. at 843. The court elaborated:

> In essence, [the d]efendants and the [d]istrict [c]ourt have adopted the position that contracting parties may invoke the authority of the FAA to decide the question of whether the parties can invoke the authority of the *FAA*. This position puts the cart before the horse: Section 4 has simply no applicability where Section 1 exempts a contract from the FAA, and private contracting parties cannot, through the insertion of a delegation clause, confer authority upon a district court that Congress chose to withhold.

Id. at 844. The court also concluded that the question of whether the § 1 exemption applies "does not fit within th[e] definition" of "questions of arbitrability." Id.

After careful consideration of these competing cases, we are persuaded that the Ninth Circuit hit the nail on the head, and we therefore hold that the issue of whether the § 1 exemption applies presents a question of "whether the FAA confers authority on the district court to compel arbitration" and not a question of arbitrability. Id.

"The Supreme Court defines 'questions of arbitrability' as questions of 'whether the parties have submitted a particular dispute to arbitration.'" Id. (quoting Howsam v. **Dean Witter Reynolds, Inc.**, 537 U.S. 79, 83 (2002)); **see also Rent-A-Ctr.**, 561 U.S. at 68-69 ("[P]arties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy."); *Arbitrability*, **Black's Law Dictionary** (10th ed. 2014) (defining arbitrability as "[t]he status, under applicable law, of a dispute's being or not being resolvable by arbitrators because of the subject matter"). In this case, determining whether the § 1 exemption applies to the contract does not entail any consideration of whether Prime and Oliveira have agreed to submit a dispute to arbitration; instead, it raises the "distinct inquiry" of whether the district court has the authority to act under the FAA — specifically, the authority under § 4 to compel the parties to engage in arbitration. Van Dusen, 654 F.3d at 844.

Therefore, as the Ninth Circuit explained in Van Dusen, the question of the court's authority to act under the FAA is an "antecedent determination" for the district court to make before it can compel arbitration under the Act. Id. at 843. Prime's argument to the contrary "puts the cart before the horse" and makes no sense. Id. at 844. The following scenario readily demonstrates why this is so: First, assume that two parties enter into a contract containing an arbitration clause with language identical to that contained in the contract in this case, including a provision delegating questions of arbitrability to the arbitrator. Second, assume that, unlike in this case, the parties are in agreement that the contract involved is clearly a contract of employment of a transportation worker. Third, assume that, as in this case, one of the parties, relying solely on the FAA, moves to compel arbitration. Taking Prime's position to its logical conclusion, the district court would be obligated to grant the motion because the parties have agreed to allow the arbitrator to decide questions of arbitrability, including whether the § 1 exemption applies. See Green, 653 F.3d at 769. This would be so even though the § 1 exemption indisputably applies to the contract, such that the district court had no authority to act under the FAA in the first place. See Van Dusen, 654 F.3d at 843 ("[A] district court has no authority to compel arbitration under Section 4 where Section 1 exempts the underlying contract from the FAA's provisions.").[11]

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[11] When confronted with the logical extreme of its position at oral argument, Prime sought to qualify it to some degree. Prime insisted that, so long as the party seeking to compel arbitration had a good-faith basis for asserting that the § 1 exemption did

This position cannot be correct. When the only basis for seeking arbitration in federal court is the FAA, the district court can grant the requested relief only if it has authority to act under the FAA. See id. at 843. If the FAA does not apply, "private contracting parties cannot, through the insertion of a delegation clause, confer authority upon a district court [i.e., to compel arbitration under the FAA] that Congress chose to withhold." Id. at 844. Therefore, "the district court must make an antecedent determination that a contract is arbitrable under Section 1 of the FAA before ordering arbitration pursuant to Section 4." Id. at 843.

Because we reject Green's starting premise — that the issue of § 1's applicability is a question of arbitrability — we are unpersuaded by Green's reliance on a contract's incorporation of the AAA rules, which allow an arbitrator to determine his or her own jurisdiction. Where, as here, the parties dispute whether the district court has the authority to compel arbitration under the FAA, the extent of the arbitrator's jurisdiction is of no concern. Instead, we are concerned only with the question of whether the district court has authority to act under a federal statute. Nothing in the AAA rules — including the power to determine the arbitrator's jurisdiction — purports to allow the

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not apply, the question of the applicability of the § 1 exemption would need to be arbitrated under the delegation clause of the arbitration agreement. But, even with this minor qualification, Prime's position still boils down to the conclusion that the district court can compel arbitration under the FAA before determining whether it has authority to act under the FAA, even in a case where it might not have such authority. We do not accept this position.

arbitrator to decide whether a federal district court has the authority to act under a federal statute.[12]

For all these reasons, we join our colleagues on the Ninth Circuit and hold that the question of whether the § 1 exemption applies is an antecedent determination that must be made by the district court before arbitration can be compelled under the FAA. But we can't stop there.

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[12] We are likewise unmoved by each of Prime's subsidiary arguments, all of which are grounded on the question-of arbitrability premise that we reject. For example, Prime's invocation of the liberal federal policy in favor of arbitration and its corollary, the principle that any doubts about the scope of arbitrable issues should be resolved in favor of arbitration, goes nowhere because we are not confronted with a scope question. See Paul Revere Variable Annuity Ins. Co. v. Kirschhofer, 226 F.3d 15, 25-26 (1st Cir. 2000). Similarly, Prime's argument that, so long as the court is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue," 9 U.S.C. § 4, the court must compel arbitration overlooks that one does not even approach the § 4 inquiry until one first determines that the § 1 exemption does not apply. See Van Dusen, 654 F.3d at 843-44. Finally, Prime's effort to compare the question of the applicability of the § 1 exemption to questions concerning the validity of an agreement or whether it can be enforced by the party seeking to compel arbitration — questions that can be referred to the arbitrator — is unavailing. Issues concerning alleged flaws with an agreement's validity or enforceability are fundamentally different than the issue of the district court's authority to act under the FAA in the first place. See id. at 844 ("[P]rivate contracting parties cannot, through the insertion of a delegation clause, confer authority upon a district court that Congress chose to withhold."). Additionally, it is not unusual for a court to first decide a specific challenge to the validity or enforceability of the arbitration clause that a party is seeking to enforce. See Rent-A-Ctr., 561 U.S. at 71; Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967).

B. Independent Contractors and the § 1 Exemption

After concluding that it must decide for itself whether the § 1 exemption applies, the district court in this case ordered the parties to conduct factual discovery to determine whether Oliveira was truly an independent contractor or instead was in reality a Prime employee during the time that the contract was in place. Discovery on that issue was necessary, in the court's view, because "courts generally agree that the § 1 exemption does not extend to independent contractors."

On appeal, both parties challenge this aspect of the district court's order. Prime agrees that § 1 does not extend to independent contractors, but it argues that discovery on the relationship between the parties is inappropriate because Oliveira's status as a Prime employee or independent contractor should be decided by the arbitrator. See **AT&T Techs., Inc.** v. Comm'cns Workers of Am., 475 U.S. 643, 649 (1986) ("[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims."). Alternatively, Prime argues that if the district court must determine whether the § 1 exemption applies, it should consider only whether the face of the contract demonstrates an intent to make Oliveira an independent contractor. Oliveira, on the other hand, argues that the § 1 exemption covers the employment contracts of "all transportation workers, including independent contractors." If we agree with Oliveira, discovery is not needed.

Thus, the question presented is whether the § 1 exemption extends to transportation-worker agreements that establish or purport to establish independent-contractor relationships, and we review this issue of statutory interpretation de novo.[13] See United States v. Maldonado-Burgos, 844 F.3d 339, 340 (1st

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[13] We have considered the possibility, proposed by our dissenting colleague, of remanding without deciding this question of statutory interpretation. The benefit of this approach, according to the dissent, would be avoiding this difficult legal question now on the chance that the discovery contemplated by the district court might lead to a conclusion that Oliveira is not an independent contractor — a conclusion that would moot, for this case, the question whether independent contractors are within the exemption. But we do not view this approach as a viable option because the district court ordered discovery based on its legal conclusion that "the § 1 exemption does not extend to independent contractors." If that legal conclusion is incorrect — an issue that Oliveira sufficiently raised below and both parties have briefed on appeal — there is no need for discovery in the first place. Therefore, we will not adopt an approach that assumes away one of the live issues on appeal simply because the issue is a difficult one. Cf. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 375 (2010) (Roberts, C.J., concurring) ("It should go without saying . . . that we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right. Thus while it is true that '[i]f it is not necessary to decide more, it is necessary not to decide more,' . . . sometimes it is necessary to decide more. There is a difference between judicial restraint and judicial abdication."). Finally, we note that we are not convinced that the dissent's approach in fact provides a narrower ground of decision; such an approach would require us to address Prime's contention (which the dissent implicitly rejects) that discovery on the parties' relationship would render the contractual right to arbitration a nullity. Addressing that contention would present its own set of challenges, but, given the manner in which we decide the statutory-interpretation question, that issue is the one that need not be decided in this appeal.

Cir. 2016). As always, the statutory text is our starting point. See id. The § 1 exemption provides that nothing contained in the FAA "shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (emphasis added). The Supreme Court has declared that "[§] 1 exempts from the FAA only contracts of employment of transportation workers." Circuit City, 532 U.S. at 119.

Before embarking on our analysis, we first identify two issues that we need not decide. First, Prime does not dispute that Oliveira, whose work for Prime included driving a truck across state lines, is a "transportation worker" within the meaning of the § 1 exemption, as interpreted by Circuit City.[14] Thus, we

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[14] The district court's decision indicated that the parties did not dispute this issue. Similarly, Prime did not argue in its opening brief that Oliveira is not a transportation worker. In a single sentence in its reply brief, Prime asserts that this court "has never extended the [§] 1 [e]xemption to truck drivers, as opposed to rail workers and seamen (the core workers of concern when Congress enacted the exemption)." To the extent that Prime intended this lone sentence to resurrect the transportation-worker issue in this case, we will not allow it. Any such "argument" is wholly undeveloped, see United States v. Sevilla-Oyola, 770 F.3d 1, 13 (1st Cir. 2014) ("Arguments raised in only a perfunctory and undeveloped manner are deemed waived on appeal."), and, moreover, an argument that makes its debut in a reply brief will not receive a warm ovation from us, see United States v. Arroyo-Blas, 783 F.3d 361, 366 n.5 (1st Cir. 2015) ("[A] legal argument made for the first time in an appellant's reply brief comes too late and need not be addressed." (quoting United States v. Brennan, 994 F.2d 918, 922 n.7 (1st Cir. 1993))). Finally, we note in passing that Prime's position has not been accepted elsewhere. See, e.g., Lenz v. Yellow Transp., Inc., 431 F.3d 348, 351 (8th Cir. 2005) ("Indisputably, if Lenz were a truck driver, he would be considered a

have no need to definitively decide that issue. Second, we note that, although the parties to the contract are Prime and Hallmark, Prime has, both below and on appeal, treated the contract as one between Oliveira and Prime.[15] We do the same. Therefore, because the parties do not dispute that Oliveira is a transportation worker under § 1, we need not address whether an LLC or other corporate entity can itself qualify as a transportation worker. We also need not address the scope of the word "worker" in the residual clause of the § 1 exemption. Accordingly, we limit our focus to the issue of whether an agreement between a trucking company and an individual transportation worker cannot be a "contract of employment" within the

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transportation worker under § 1 of the FAA."); Harden v. Roadway Package Sys., Inc., 249 F.3d 1137, 1140 (9th Cir. 2001) ("As a delivery driver for RPS, Harden contracted to deliver packages 'throughout the United States, with connecting international service.' Thus, he engaged in interstate commerce that is exempt from the FAA.").

[15] Before the district court, Prime opposed Oliveira's argument that he could not be personally bound by the terms of the contract between Prime and Hallmark by arguing that "Oliveira and Hallmark Trucking are factually one and the same." Along similar lines, Prime stated in its opening brief that "Oliveira entered into an Independent Contractor Operating Agreement . . . with Prime" (emphasis added), and its brief proceeded on the assumption that Oliveira and Hallmark were interchangeable. In its reply brief, for the first time in this case, Prime relies on the fact that the contract was between Prime and Hallmark in arguing that the contract established an independent-contractor relationship. We need not decide whether Prime is judicially estopped from taking this position at this late juncture; it suffices that a reply brief is not the appropriate place to switch gears and offer new arguments. See Arroyo-Blas, 783 F.3d at 366 n.5.

meaning of § 1 if the agreement establishes or purports to establish an independent-contractor relationship.

Prime points out that the weight of district-court authority to consider the issue has concluded that the § 1 exemption does not extend to contracts that establish or purport to establish an independent-contractor relationship.[16] Several of these decisions simply assume, explicitly or implicitly, that independent-contractor agreements are not contracts of employment under § 1. See, e.g., Aviles, 2015 WL 5601824, at *6;

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[16] See, e.g., Aviles v. **Quik Pick Express, LLC**, No. CV-15-5214-MWF (AGR), 2015 WL 5601824, at *6 (C.D. Cal. Sept. 23, 2015); Morning Star Assocs., Inc. v. **Unishippers Glob. Logistics, LLC**, No. CV-115-033, 2015 WL 2408477, at *5-7 (S.D. Ga. May 20, 2015); Doe v. **Swift Transp. Co.**, No. 2:10-cv-00899 JWS, 2015 WL 274092, at *3 (D. Ariz. Jan. 22, 2015); Alvarado v. Pac. Motor Trucking Co., No. EDCV 14-0504-DOC(DTBx), 2014 WL 3888184, at *4-5 (C.D. Cal. Aug. 7, 2014); Villalpando v. Transguard Ins. Co. of Am., 17 F. Supp. 3d 969, 982 (N.D. Cal. 2014); Carney v. JNJ Express, Inc., 10 F. Supp. 3d 848, 852 (W.D. Tenn. 2014); **Port Drivers Fed'n 18, Inc.** v. All Saints, 757 F. Supp. 2d 463, 472 (D.N.J. 2011); Davis v. **Larson Moving & Storage Co.**, Civ. No. 08-1408 (JNE/JJG), 2008 WL 4755835, at *4 (D. Minn. Oct. 27, 2008); **Owner-Operator Indep. Drivers Ass'n** v. United Van Lines, LLC, No. 4:06CV219 JCH, 2006 WL 5003366, at *3 (E.D. Mo. Nov. 15, 2006); **Owner-Operator Indep. Drivers Ass'n** v. **Swift Transp. Co.**, 288 F. Supp. 2d 1033, 1035-36 (D. Ariz. 2003); **Roadway Package Sys., Inc.** v. Kayser, No. CIV. A. 99-MC-111, 1999 WL 817724, at *4 n.4 (E.D. Pa. Oct. 13, 1999); see also **Performance Team Freight Sys., Inc. v. Aleman, 194** Cal. Rptr. **3d 530, 536-37 (Cal. Ct. App. 2015); Johnson v. Noble**, 608 N.E.2d 537, 540 (Ill. App. Ct. 1992); cf. Bell v. **Atl. Trucking Co.**, No. 3:09-cv-406-J-32MCR, 2009 WL 4730564, at *4-6 (M.D. Fla. Dec. 7, 2009) (conducting analysis on applicability of § 1 exemption on assumption it does not apply to independent contractors).

Doe, 2015 WL 274092, at *3; **Villalpando**, 17 F. Supp. 3d at 982; Bell, 2009 WL 4730564, at *4-6; Davis, 2008 WL 4755835, at *4; Kayser, 1999 WL 817724, at *4 n.4; **see also Johnson**, 608 N.E.2d at 540.[17] Other courts have "simply go[ne] along with the developing group consensus," **In re Atlas IT Exp. Corp.**, 761 F.3d 177, 183 (1st Cir. 2014), without adding any independent analysis. See, e.g., **Alvarado**, 2014 WL 3888184, at *4-5; Carney, 10 F. Supp. 3d at 853; **All Saints**, 757 F. Supp. 2d at 472; **see also** Aleman, 194 Cal. Rptr. 3d at 536-37. The few district-court decisions that offer independent analysis to support the conclusion that

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[17] This assumption was implicit in Judge Ikuta's dissenting opinion in In re Swift Transportation Co., 830 F.3d 913 (9th Cir. 2016). The majority in Swift determined that mandamus relief was not warranted because the district court's proposed course of action — "resolv[ing] the § 1 question through discovery and a trial" — was not clearly erroneous; the district court's decision was not contrary to any Supreme Court or Ninth Circuit precedent, and "there [did] not appear to be any decisions from [the other] circuits on the question of whether the FAA compels a certain procedural choice in a district court's § 1 determination." Id. at 917. Judge Ikuta dissented, expressing her belief that the § 1 determination should be made solely from an examination of the contract's terms. Id. at 920-21 (Ikuta, J., dissenting). Implicit in Judge Ikuta's dissent is the assumption that independent-contractor agreements are not contracts of employment under the FAA. But there was good reason for that assumption in the circumstances of that case: Unlike in this case, none of the litigants argued that independent-contractor agreements of transportation workers are contracts of employment. And the district court in that case simply assumed — with no analysis or citation to authority — that the § 1 exemption covered only contracts between employers and employees. See Doe, 2015 WL 274092, at *3 ("Whether the parties formed an employment contract — that is whether plaintiffs were hired as employees — necessarily involves a factual inquiry apart from the contract itself.").

the § 1 exemption does not cover independent-contractor agreements have, viewed collectively, offered two reasons for that conclusion: first, that this interpretation is consistent with the "strong and liberal federal policy favoring arbitral dispute resolution," Swift Transp., 288 F. Supp. 2d at 1035-36; **see also Morning Star**, 2015 WL 2408477, at *5; **United Van Lines**, 2006 WL 5003366, at *3; and, second, that such a rule is justified by the narrow construction that the Supreme Court has instructed courts to give the § 1 exemption, see **United Van Lines**, 2006 WL 5003366, at *3.

Prime urges us to add our voice to this "judicial chorus," but we are unwilling to do so. Interpreting a federal statute is not simply a numbers game. See **In re Atlas IT Exp. Corp.**, 761 F.3d at 182-83 ("The numbers favoring a rule do not necessarily mean that the rule is the best one. Indeed, there is an observable phenomenon in our courts of appeal and elsewhere — sometimes called 'herding' or 'cascading' — where decisionmakers who first encounter a particular issue (i.e., the first court to consider a question) are more likely to rely on the record presented to them and their own reasoning, while later courts are increasingly more likely to simply go along with the developing group consensus."). Instead of simply tallying the score, "it is always incumbent on us to decide afresh any issue of first impression in our circuit." Id. at 183. After conducting that fresh look in this case, we are distinctly unpersuaded by the district courts' treatment of this issue.

The fatal flaw in the district-court authority on which Prime relies is a failure to closely examine the statutory text — the critical first step in any statutory-interpretation inquiry. See **Maldonado-Burgos**,

844 F.3d at 340. Because Congress did not provide a definition for the phrase "contracts of employment" in the FAA, we "give it its ordinary meaning." United States v. Stefanik, 674 F.3d 71, 77 (1st Cir. 2012) (quoting United States v. Santos, 553 U.S. 507, 511 (2008)). And we discern the ordinary meaning of the phrase at the time Congress enacted the FAA in 1925. See Perrin v. United States, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. Therefore, we look to the ordinary meaning of the term . . . at the time Congress enacted the statute . . . ." (citation omitted)); see also Sandifer v. U.S. Steel Corp., 134 S. Ct. 870, 876 (2014) (consulting "[d]ictionaries from the era of [statutory provision's] enactment" to espy ordinary meaning of undefined term); Carcieri v. Salazar, 555 U.S. 379, 388 (2009) ("We begin with the ordinary meaning of the word 'now,' as understood when the [statute] was enacted.").[18] We now turn to that task.

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[18] At oral argument, Prime insisted that the Supreme Court in Circuit City rejected this approach for discerning the plain meaning of the FAA's text. But the Court did no such thing. In that case, the Court was confronted with an argument that, "because the FAA was enacted when congressional authority to regulate under the commerce power was to a large extent confined by [Supreme Court] decisions," the phrase "engaged in commerce" in § 1 should be interpreted as "expressing the outer limits of Congress'[s] power as then understood." Circuit City, 532 U.S. at 116. The Court rejected this argument, which it characterized as "[a] variable standard" depending on "shifts in the Court's Commerce Clause cases" that would require courts to "take into account the scope of the Commerce Clause, as then elaborated by the Court, at the date of the FAA's enactment in order to interpret what the

1. Ordinary Meaning of Statutory Text

Oliveira argues that the phrase "contracts of employment" contained in § 1 means simply "agreements to do work." We agree. This interpretation is consistent with the ordinary meaning of the phrase at the time Congress enacted the FAA.

Dictionaries from the era of the FAA's enactment confirm that the ordinary meaning of "contracts of employment" in 1925 was agreements to perform work. See **Webster's New International Dictionary of the English Language** 488 (W.T. Harris & F. Sturges Allen eds., 1923) (defining "contract" when used as noun as "[a]n agreement between two or more persons to do or forbear something"); id. at 718 (defining "employment" as "[a]ct of employing, or state of being employed" and listing "work" as synonym for "employment"); id. (defining "employ" as "[t]o make use of the services of; to have or keep at work; to give employment to"); see also **Webster's Collegiate Dictionary**

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statute means now." Id. at 116-17. The Court reasoned that "[i]t would be unwieldy for Congress, for the Court, and for litigants to be required to deconstruct statutory Commerce Clause phrases depending upon the year of a particular statutory enactment." Id. at 118. In this case, by contrast, our attempt to discern the ordinary meaning of the phrase "contracts of employment" does not require us to sort through paradigm shifts in Supreme Court precedent but simply to apply the "fundamental canon of statutory construction" that undefined statutory terms should be given their ordinary meaning at the time of the statute's enactment, Sandifer, 134 S. Ct. at 876 (quoting Perrin, 444 U.S. at 42) — a canon that has been applied in FAA cases since Circuit City. See, e.g., Conrad v. Phone Directories Co., 585 F.3d 1376, 1381-82 & n.1 (10th Cir. 2009) (in interpreting undefined term in § 16 of FAA, consulting dictionary from era of § 16's enactment).

329 (3d ed. 1925) (providing similar definition of "employment" and similarly listing "work" as synonym for "employment"); id. (defining "employ" as "[t]o make use of; use" and "[t]o give employment or work to" and explaining "[e]mploy is specifically used to emphasize the idea of service to be rendered"). In other words, these contemporary dictionaries do not suggest that "contracts of employment" distinguishes employees from independent contractors.[19]

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[19] Although not referenced by either party, we note that the current edition of **Black's Law Dictionary** indicates that the earliest known use of the phrase "employment contract" was 1927 — two years after the FAA's enactment. See *Employment Contract*, **Black's Law Dictionary** (10th ed. 2014); id. at xxxi (explaining that "[t]he parenthetical dates preceding many of the definitions show the earliest known use of the word or phrase in English"). The current edition also indicates that "contract of employment" is a synonym for "employment contract," and it defines "employment contract" in a manner that arguably excludes independent contractors: "[a] contract between an employer and employee in which the terms and conditions of employment are stated." *Employment Contract*, **Black's Law Dictionary** (10th ed. 2014). It is unclear whether the unknown source from 1927 provided the basis for the current definition of "employment contract" or, instead, whether that source has merely been identified as the first known use of the phrase. We need not, however, dwell on this point because, as explained below, several sources from the era of the FAA's enactment use the phrase "contract of employment" to refer to independent contractors. Additionally, we note that the two editions of **Black's Law Dictionary** that bookend the FAA's enactment, see Black's Law Dictionary (3d ed. 1933); **Black's Law Dictionary** (2d ed. 1910), provide no definition for the phrases "contract of employment" or "employment contract."

Additionally, this ordinary meaning of "contracts of employment" is further supported by other authorities from the era of the FAA's enactment, which suggest that the phrase can encompass agreements of independent contractors to perform work. See, e.g., Annotation, Teamster as Independent Contractor Under Workmen's Compensation Acts, 42 A.L.R. 607, 617 (1926) ("When the contract of employment is such that the teamster is bound to discharge the work himself, the employment is usually one of service, whereas, if, under the contract, the teamster is not obligated to discharge the work personally, but may employ others to that end and respond to the employer only for the faithful performance of the contract, the employment is generally an independent one." (emphasis added)); Theophilus J. Moll, A Treatise on the Law of Independent Contractors & Employers' Liability 47-48 (1910) ("It has been laid down that the relation of master and servant will not be inferred in a case where it appears that the power of discharge was not an incident of the contract of employment." (emphasis added)); id. at 334 ("The [independent] contractor . . . is especially liable for his own acts when he assumes this liability in his contract of employment." (emphasis added)).[20]

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[20] See also Luckie v. Diamond Coal Co., 183 P. 178, 182 (Cal. Dist. Ct. App. 1919) ("We think that the nature of Foulk's relation to defendant at the time of the accident, whether that of an independent contractor or servant, must be determined not alone from the terms of the written contract of employment, but from the subsequent conduct of each, known to and acquiesced in by the other." (emphasis added)); Hamill v. Territilli, 195 Ill. App. 174, 175 (1915) ("[T]he only question in the case was whether or not, under the contract of employment, the relationship existing

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between Territilli and Scully and the appellant was that of independent contractor or that of master and servant . . . ." (emphasis added)); Eckert's Case, 124 N.E. 421, 421 (Mass. 1919) ("It was provided by his contract of employment that he should furnish the team, feed, take care of and drive the horses for a fixed daily remuneration. The entire management and mode of transportation were under his control . . . . It is plain as matter of law . . . that when injured he was not an employé of the town but an independent contractor." (emphasis added) (citations omitted)); Lindsay v. McCaslin, 122 A. 412, 413 (Me. 1923) ("When the contract of employment has been reduced to writing, the question whether the person employed was an independent contractor or merely a servant is determined by the court as a matter of law." (emphasis added)); Allen v. Bear Creek Coal Co., 115 P. 673, 679 (Mont. 1911) ("The relation of the parties under a contract of employment is determined by an answer to the question, Does the employé in doing the work submit himself to the direction of the employer, both as to the details of it and the means by which it is accomplished? If he does, he is a servant, and not an independent contractor. If, on the other hand, the employé has contracted to do a piece of work, furnishing his own means and executing it according to his own ideas, in pursuance of a plan previously given him by the employer, without being subject to the orders of the latter as to detail, he is an independent contractor." (emphasis added)); Tankersley v. Webster, 243 P. 745, 747 (Okla. 1925) ("[T]he contract of employment between Tankersley and Casey was admitted in evidence without objections, and we think conclusively shows that Casey was an independent contractor." (emphasis added)); Kelley v. Del., L. & W. R. Co., 113 A. 419, 419 (Pa. 1921) ("The question for determination is whether deceased was an employee of defendant or an independent contractor . . . . To decide, it is necessary to construe the written contract of employment . . . ." (emphasis added)); U.S. Fid. & Guar. Co. of Baltimore, Md. v. Lowry, 231 S.W. 818, 822 (Tex. Civ. App. 1921) (stating that, in determining whether person "was an employé and not an independent contractor," "'[n]o single fact is more conclusive as to the effect of the contract of employment, perhaps, than the unrestricted right of the employer to end the particular service whenever he chooses, without regard to the final result of

Prime seeks to downplay the significance of these other authorities, noting that they do not deal with the FAA. True enough, but the phrase "contracts of employment" must have some meaning, and Prime does not attempt to explain how its proposed interpretation is consistent with the ordinary meaning of the words used in the statute. And the lack of a textual anchor is not the only flaw in Prime's interpretation. In **Circuit City**, the Supreme Court noted "Congress'[s] demonstrated concern with transportation workers and their necessary role in the free flow of goods" at the time when it enacted the FAA. 532 U.S. at 121. Given that concern, the distinction that Prime advocates based on the precise employment status of the transportation worker would have been a strange one for Congress to draw: Both individuals who are independent contractors performing transportation

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the work itself" (emphasis added) (quoting Cockran v. Rice, 128 N.W. 583, 585 (S.D. 1910))); Annotation, General Discussion of the Nature of the Relationship of Employer and Independent Contractor, 19 A.L.R. 226, 250 (1922) (discussing "the question whether a contract of employment is one of an independent quality").

Along similar lines, legal dictionaries from the era of the FAA's enactment used the term "employment" as part of the definition of "independent contractor." See, e.g., *Independent Contractor*, Ballentine's Law Dictionary (1930) (defining independent contractor as "[o]ne who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work"); *Independent Contractor*, Black's Law Dictionary (3d ed. 1933) (same); *Independent Contractor*, Black's Law Dictionary (2d ed. 1910) (same); 2 Francis Rawle, Bouvier's **Law Dictionary & Concise Encyclopedia** 1533 (3d rev. 1914) (same).

work and employees performing that same work play the same necessary role in the free flow of goods.

In sum, the combination of the ordinary meaning of the phrase "contracts of employment" and Prime's concession that Oliveira is a transportation worker compels the conclusion that the contract in this case is excluded from the FAA's reach. Because the contract is an agreement to perform work of a transportation worker, it is exempt from the FAA. We therefore decline to follow the lead of those courts that have simply assumed that contracts that establish or purport to establish independent-contractor relationships are not "contracts of employment" within the meaning of § 1.

2. Narrow Construction and Policy Favoring Arbitration

We also are unpersuaded by the two justifications that some district-court decisions put forward to support the conclusion that the § 1 exemption does not apply to contracts that establish or purport to establish independent-contractor relationships — that such an interpretation is consistent with the need to narrowly construe § 1 and the liberal federal policy favoring arbitration. In our view, neither consideration warrants retreat from the ordinary meaning of the statutory text.

To be sure, the Supreme Court has cautioned that the § 1 exemption must "be afforded a narrow construction." Circuit City, 532 U.S. at 118. Prime seizes on this pronouncement and insists that it forecloses our conclusion that the § 1 exemption applies to trans-

portation-worker agreements that establish or purport to establish independent-contractor relationships. We disagree.

In Circuit City, the contract at issue was between Circuit City, a national retailer of consumer electronics, and Adams, a store sales counselor. 532 U.S. at 109-10. The Ninth Circuit had interpreted the § 1 exemption to exclude all contracts of employment from the FAA's reach. Id. at 112. In defense of this interpretation, Adams argued that the phrase "engaged in . . . commerce" in § 1 exempted from the FAA all employment contracts falling within Congress's commerce power. Id. at 114. The Supreme Court rejected this broad interpretation in favor of a narrower one that was compelled by the text and structure of § 1: "Section 1 exempts from the FAA only contracts of employment of transportation workers." Id. at 119; see id. at 114-15. Because the phrase "any other class of workers engaged in . . . commerce" appeared in the residual clause of § 1, id. at 114, the Court reasoned that "the residual clause should be read to give effect to the terms 'seamen' and 'railroad employees,' and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it," id. at 115.

This context is critical. The Court announced the need for a narrow construction of the § 1 exemption in the course of "rejecting the contention that the meaning of the phrase 'engaged in commerce' in § 1 of the FAA should be given a **broader construction than justified by its evident language**." Id. at 118 (emphasis added). As the Court explained, this broader construction was doomed by the text itself; "the text of the FAA foreclose[d] the [broader] construction of § 1," id. at

119, and "undermine[d] any attempt to give the provision a sweeping, open- ended construction," id. at 118. The Court's narrower interpretation, by contrast, was based on "the precise reading" of that provision. Id. at 119.

It is one thing to say that statutory text compels adoption of a narrow construction over "an expansive construction . . . that goes beyond the meaning of the words Congress used." Id. Prime's argument is very different: It snatches up Circuit City's narrow-construction pronouncement, wholly ignores the context in which that pronouncement was made, and attempts to use it as an escape hatch to avoid the plain meaning of the § 1 exemption's text. But nothing in Circuit City suggests that the need for a narrow construction can override the plain meaning of the statutory language in this fashion, and we reject Prime's attempt to artificially restrict the plain meaning of the text.

Moreover, Oliveira is nothing like the sales counselor in Circuit City. Instead, the truck-driving work that he performs directly impacts "the free flow of goods." Id. at 121. Therefore, Circuit City's adoption of a narrow construction to cover only transportation workers and not sales counselors is no basis for this court to accept a constricted interpretation of the phrase "contracts of employment" that is inconsistent with both the ordinary meaning of the language used in § 1 and "Congress's demonstrated concern with transportation workers and their necessary role in the free flow of goods." Id. For these reasons, we do not view Circuit City or the narrow-construction principle as supporting Prime's interpretation that the § 1 exemption does not extend to independent contractors.

We are similarly unpersuaded by invocation of the federal policy in favor of arbitration. That policy cannot override the plain text of a statute. See EEOC v. Waffle House, Inc., 534 U.S. 279, 295 (2002) (rejecting notion that "the federal policy favoring arbitration trumps the plain language of Title VII and the contract"); cf. id. at 294 (explaining that, "[w]hile ambiguities in the language of the agreement should be resolved in favor of arbitration, we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated" and concluding that "the proarbitration policy goals of the FAA do not require the [EEOC] to relinquish its statutory authority if it has not agreed to do so" (citation omitted)); Paul Revere, 226 F.3d at 25 (rejecting "attempts to invoke the federal policy favoring arbitration" because "[t]hat policy simply cannot be used to paper over a deficiency in Article III standing"); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 116 n.13 (1996) (Souter, J., dissenting) ("[P]lain text is the Man of Steel in a confrontation with background principle[s] and postulates which limit and control." (internal citation and quotation marks omitted)). As we have explained, a careful examination of the ordinary meaning of the phrase "contracts of employment" — an effort eschewed by the district-court authority cited by Prime — supports our conclusion that the phrase means agreements to perform work and includes independent-contractor agreements. The federal policy favoring arbitration cannot erase this plain meaning.

3. Final Words

For these reasons, we hold that a transportation-worker agreement that establishes or purports to establish an independent-contractor relationship is a contract of employment under § 1. We emphasize that our holding is limited: It applies only when arbitration is sought under the FAA, and it has no impact on other avenues (such as state law) by which a party may compel arbitration.[21]

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[21] Prime insists that, even if the district court is powerless to compel arbitration under the FAA because the § 1 exemption applies, it still can request the district court to "compel arbitration on other grounds, such as state law, or use other tools at its disposal to enforce the parties' explicit agreement to arbitrate — such as dismissing or staying the case." For his part, Oliveira appears to suggest that this ship has sailed because Prime's motion to compel was based solely on the FAA. Prime counters that, to the extent Oliveira is under the impression that Prime has waived the right to compel arbitration on grounds other than the FAA, he is mistaken because no prejudice has been shown. We do not wade into this dispute. The fleeting references in both parties' briefs are hardly the stuff of developed argumentation, and this waiver issue was not addressed by the district court. If the parties desire to continue this fight in the district court, they are free to do so.

Along similar lines, although Prime argues in its opening brief that the arbitration provision covers disputes between the parties that arose before and after the time period in which the contract was in effect, it takes a different tack in its reply brief, imploring us to refrain from deciding this issue because the district court did not definitively rule on it below. We accept Prime's invitation and leave the issue for the district court to address in the first instance.

Conclusion

To recap, we hold that, when confronted with a motion to compel arbitration under § 4 of the FAA, the district court, and not the arbitrator, must decide whether the § 1 exemption applies. Additionally, we hold that transportation-worker agreements that establish or purport to establish independent-contractor relationships are "contracts of employment" within the meaning of the § 1 exemption.[22] Because the contract in this case is within the § 1 exemption, the FAA does not apply, and we consequently lack jurisdiction under 9 U.S.C. § 16(a)(1)(B) — the only conceivable basis for our jurisdiction over this interlocutory appeal. See Int'l Bhd. of Teamsters Local Union No. 50 v. Kienstra Precast, LLC, 702 F.3d 954, 957-58 (7th Cir. 2012). Accordingly, we affirm the district court's denial of Prime's motion to compel arbitration, and dismiss the appeal for lack of appellate jurisdiction.

-Concurring and Dissenting Opinion Follows-

BARBADORO, District Judge, concurring in part and dissenting in part. I agree with the majority that the applicability of the § 1 exemption is a threshold matter for the district court to decide. Where we part company is at the point where the majority decides to take on the difficult issue as to whether transportation-worker agreements that purport to create independent-contractor relationships are exempt from the Federal Arbitration Act. That, in my view, is an issue we need not decide now. Instead,

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[22] In light of this conclusion, we need not address the parties' arguments about the necessity and permissibility of discovery in the event that the § 1 exemption does not apply to independent-contractor agreements.

if it ultimately proves necessary to determine whether the § 1 exemption covers all such independent-contractor agreements, the district court should do so in the first instance with the benefit of more in-depth briefing and a fully developed factual record.

The scope of the § 1 exemption comes before us on what amounts to an interlocutory appeal. See Omni Tech Corp. v. MPC Sols. Sales, LLC, 432 F.3d 797, 800 (7th Cir. 2005). The district court did not reach any final judgment as to the exemption, instead dismissing New Prime's motion to compel arbitration without prejudice and allowing for discovery on Oliveira's employment status. Oliveira v. New Prime, Inc., 141 F. Supp. 3d 125, 135 (D. Mass. 2015). As there has been no final judgment in the district court, I hesitate to resolve an issue that is not necessary to the disposition of this appeal. See Doe v. Cape Elizabeth Sch. Dist., 832 F.3d 69, 86 (1st Cir. 2016) (declining to address unnecessary issue and deeming it prudent to allow district court to make determination in the first instance). And it is indeed unnecessary to determine the scope of the exemption at this time. If the case were remanded to the district court for discovery, the court might well rule that the nominally independent-contractor agreements between Oliveira and New Prime actually created an employer-employee relationship. In that circumstance, neither we nor the district court would have any occasion to categorically decide whether all transportation-worker agreements purporting to create independent-contractor relationships qualify for the § 1 exemption.

I am particularly reluctant to unnecessarily resolve an issue on an interlocutory appeal when, as is

the case here, a number of factors counsel against doing so. Most fundamentally, deciding whether "contracts of employment" includes all transportation-worker agreements presents a challenging question of statutory interpretation. The statute itself provides little guidance. Further, as the majority notes, most courts that have considered independent-contractor agreements in the § 1 context have concluded that the exemption does not apply, and no other court has engaged in the kind of detailed analysis of ordinary meaning that characterizes the majority's opinion. We therefore have neither an example to guide and corroborate our analysis nor a contrary opinion to provide counterbalance.

Moreover, applying § 1 in this case requires venturing into the fact-bound, and notoriously precarious, field of employment-status determinations. Although the majority's categorical rule would eliminate the need for fact-finding on status, it could also lead to the over- and under-inclusiveness concerns typical of such rules. As Justice Rutledge observed in NLRB v. Hearst Publications, 322 U.S. 111 (1944): "Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing." Id. at 121 (subsequent history omitted). The doctrinal line separating employee from independent contractor is difficult to discern in the context of vicarious liability. See id. "It becomes more [difficult] when the field is expanded to include all of the possible applications of the distinction." Id. We find ourselves confronted by one of those "possible applications," making the issue before us all

the more challenging. See Mandel v. Boston Phoenix, Inc., 456 F.3d 198, 206–07 (1st Cir. 2006) (vacating and remanding summary judgment order where, inter alia, there was little on-point federal or state case law and pertinent determination was fact-intensive).

Not only do we face a hard question — given that the contemporary meaning of § 1's language may differ from its meaning when adopted — but we do so without the aid of a well-developed district court record. Before the district court, the parties provided little briefing on the ordinary meaning of "contracts of employment" as of 1925. Oliveira initially argued that he was an employee of New Prime. He first briefed an ordinary-meaning argument in a short supplemental surreply submitted to the district court after a hearing on the motion to compel arbitration. Oliveira cited just two sources from the time of adoption. In a subsequent supplemental surreply, New Prime declined to address the ordinary-meaning issue head-on, instead only reiterating that the matter was for the arbitrator. The district court's order reflects this dearth of briefing. Rather than directly addressing the less-than-robust argument Oliveira raised in his supplemental brief, the court noted the extensive contrary case law and permitted discovery to resolve the case. See Oliveira, 141 F. Supp. 3d at 130–31, 135. When the ordinary-meaning issue reached this court, the record accordingly provided little guidance. See United States v. Clark, 445 U.S. 23, 38 (1980) (Rehnquist, J., dissenting) (recognizing usefulness of lower court opinions); Cape Elizabeth Sch. Dist., 832 F.3d at 84–85 (choosing not to decide unnecessary question where parties gave "scant attention" to issue in lower court).

The briefing before this court was also less than ideal. Although Oliveira devoted significant effort to arguing that the ordinary meaning of "contracts of employment" in 1925 included contracts with independent contractors, New Prime barely addressed the matter. It did not mention the ordinary-meaning argument in its opening brief, and spent only a page on the topic in its reply brief. At oral argument, New Prime merely insisted that ordinary-meaning analysis is inappropriate in the § 1 context. Where a court has the discretion to decide an issue, it should be wary of acting without the benefit of fully developed arguments on both sides. That is especially the case when we rule against the party with the less-developed argument.

Just as we have been presented with a one-sided view of the ordinary meaning of "contracts of employment," we have received a one-sided view of the facts. This appeal was taken early in the litigation between the parties, prior to any discovery that would have shed greater light on the facts underlying the dispute. The current factual record contains only Oliveira's unanswered complaint and some documents attached to the parties' motions. While the court is entitled to base its analysis on allegations in the complaint, Gove v. Career Sys. Dev. Corp., 689 F.3d 1, 2 (1st Cir. 2012), we should exercise added caution in denying affirmative relief to a defendant when our view of the facts is informed largely by the plaintiff's untested allegations.

Under these circumstances, our best option is to remand the § 1 exemption question to the district court so that discovery may proceed and the court may reach a final decision. If either party were to appeal

any subsequent final decision of the district court, we would have the benefit of a better-developed factual record, more-focused briefing from both parties, and additional district court analysis. See Denmark v. Liberty Life Assur. Co. of Boston, 566 F.3d 1, 12 (1st Cir. 2009) (Lipez, J., concurring) (expressing concern over dicta in majority opinion "fashioned without the benefit of district court analysis or briefing by the parties").

The majority has done an impressive job of marshalling the arguments in support of its interpretation of § 1. I dissent not to take issue with the court's reasoning but merely to express my view that we would be better served in following a more cautious path.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the First Circuit

DOMINIC OLIVEIRA, on his behalf and on behalf of all others similarly situated Plaintiff-Appellee, v. NEW PRIME, INC. Defendant-Appellant.	No. 15-2364

Before

Howard, Chief Judge,
Torruella, Lynch, Thompson,
Kayatta and Barron, Circuit Judges,
and Barbadoro,* District Judge.

* Of the District of New Hampshire, sitting by designation.

ORDER OF COURT

Entered: June 27, 2017

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Richard H. Frankel
Hillary A. Schwab
Brant Casavant
Andrew Arthur Schmidt
Jennifer Bennett
William E. Quirk
Robert John Hingula
Judith A. Leggett
James C. Sullivan
Jason C. Schwartz
Joshua S. Lipshutz
Theodore J. Boutrous Jr.
Richard Pianka
Andrew J. Pincus
Warren David Postman
Archis Ashok Parasharami
Daniel Edward Jones
Kate Comerford Todd

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DOMINIC OLIVEIRA, Plaintiff v. NEW PRIME, INC., Defendant.	Civil Action No. 15-10603-PBS

MEMORANDUM AND ORDER

October 26, 2015

Saris, C.J.

INTRODUCTION

This case involves a labor dispute between a trucking corporation and a former truck driver. In March 2015, the plaintiff Dominic Oliveira brought this proposed class action alleging that the defendant New Prime, Inc. violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq., and Missouri and Maine labor laws, by failing to pay its truck drivers minimum wage (Docket Nos. 1, 33). New Prime moved to compel arbitration under § 4 of the Federal Arbitra-

tion Act (FAA), 9 U.S.C. § 4, and two operating agreements signed by Oliveira on behalf of Hallmark Trucking LLC, both of which contain an arbitration clause (Docket No. 35). Oliveira argues that the Court must determine whether the operating agreements are exempt from arbitration under § 1 of the FAA before it can consider New Prime's motion to compel arbitration (Docket No. 40). New Prime maintains that the exemption's application is a threshold question of arbitrability that the parties delegated to the arbitrator in the operating agreements (Docket No. 51). After hearing, I agree that it is for the Court, and not the arbitrator, to decide whether the § 1 exemption applies before considering the motion. The motion to compel arbitration is therefore **DENIED** without prejudice.[1]

FACTUAL BACKGROUND

The following facts are taken from the First Amended Complaint (Docket No. 33) and the operating agreements referenced by all parties (Docket No. 36, Ex. A, Ex. B). In March 2013, Plaintiff Dominic Oliveira entered Defendant New Prime's "Paid Apprenticeship" training program, which is advertised as an on-the-job training program for new truck driv-

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[1] Alternatively, New Prime argues that the Court should dismiss the case for improper venue because the arbitration clause states that arbitration is to take place in Missouri. If the case remains in this Court and moves forward, New Prime moves to dismiss Oliveira's breach of contract/unjust enrichment claim (Count 3), arguing that it is preempted by the FLSA and the Federal Aviation Administration Authorization Act. The Court will not address these issues until the threshold issue of exemption is resolved.

ers. Docket No. 33, Ex. 2, Ex. 3. Apprentices first obtain a Missouri Commercial Driver's License (CDL) permit. They next shadow New Prime drivers for three to four weeks and drive 10,000 miles under supervision. During this time, apprentices receive an advance of $200 per week, which is subtracted from their future earnings, but otherwise receive no remuneration. As a result, apprentices are essentially free labor while they train with New Prime. Under Department of Transportation regulations, trucks can be on the road for longer periods of time when a New Prime driver switches off with an apprentice.

After completion of this on-the-road instruction, apprentices take a CDL exam and then work as a "B2" company driver trainee for 30,000 miles. During this period, the trainees earn fourteen cents per mile driven, but are not paid for time spent loading and unloading cargo or protecting company property. The company also regularly deducts money from paychecks, including the $200 weekly advance from the apprenticeship program. As a result of these deductions, Oliveira received approximately $440-$480 per week for driving 5,000-6,000 miles, which equates to about $4/hour while driving.

Finally, after completing the 30,000 miles as a B2 company driver trainee, the truck drivers complete additional orientation classes, which last for about a week. They are then classified as either company drivers or independent contractors. The truck drivers are not paid for the time spent in the orientation classes, and receive a $100 bonus if they opt to become independent contractors.

In May 2013, when Oliveira returned from his trainee driving, New Prime told Oliveira that he could make more money if he became an independent contractor. New Prime directed him to a company called Abacus Accounting, which was located on the second floor of New Prime's building. Abacus Accounting told Oliveira to provide suggested names for a limited liability company (LLC), and then created Hallmark Trucking LLC on his behalf. New Prime also directed Oliveira to Success Leasing, a closely related corporation to New Prime, to select a truck.

At Success Leasing, Oliveira was given several documents to sign. One of these documents was titled "INDEPENDENT CONTRACTOR OPERATING AGREEMENT," which repeatedly states that the intent of the agreement is to establish an independent contractor relationship between New Prime and Hallmark Trucking LLC. Docket No. 36, Ex. A, at 1, 9. The agreement also contains the following arbitration clause:

> GOVERNING LAW AND ARBITRATION. THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF MISSOURI. ANY DISPUTES ARISING UNDER, ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING AN ALLEGATION OF BREACH THEREOF, AND ANY DISPUTES ARISING OUT OF OR RELATING TO THE RELATIONSHIP CREATED BY THE AGREEMENT, AND ANY DISPUTES AS TO THE RIGHTS AND OBLIGATIONS OF THE PARTIES, INCLUDING THE ARBITRABILITY OF DISPUTES BETWEEN THE PARTIES, SHALL BE FULLY RESOLVED BY ARBITRATION IN ACCORDANCE WITH MISSOURI'S

> ARBITRATION ACT AND/OR THE FEDERAL ARBITRATION ACT . . . THE PARTIES SPECIFICALLY AGREE THAT NO DISPUTE MAY BE JOINED WITH THE DISPUTE OF ANOTHER AND AGREE THAT CLASS ACTIONS UNDER THIS ARBITRATION PROVISION ARE PROHIBITED . . . THE PLACE OF THE ARBITRATION HEREIN SHALL BE SPRINGFIELD, MISSOURI.

Id. at 10. Oliveira "felt pressure" to sign quickly because New Prime had a load waiting for him outside. Docket No. 33, ¶ 45. Success Leasing then instructed Oliveira to go to the New Prime company store to purchase security locks, fuel, insurance, and other tools of the trade. These items totaled roughly $5,000, which New Prime then deducted from his paycheck at a rate of $75 per week.

Although New Prime labeled Oliveira an independent contractor in the operating agreement, his role as a truck driver for New Prime did not change from his time as an apprentice and trainee driver. New Prime continued to directly and indirectly control Oliveira's scheduling, vacations, and time at home by requiring him to take specific training courses and follow certain procedures. These courses and procedures limited which shipments he could take and made it difficult, if not impossible, for him to work for other trucking or shipping companies. In particular, New Prime dispatched drivers through a "QUALCOMM system" that was not adaptable to other carriers. Docket No. 33, ¶ 51.[2]

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[2] The parties have not explained what the "QUALCOMM SYSTEM" is or how it works.

Meanwhile, New Prime continued to make regular deductions from Oliveira's paycheck, ostensibly because of lease payments on the truck and payments for the other tools that New Prime instructed him to buy. On several occasions, his weekly pay was negative after spending dozens of hours on the road. In March 2014, Oliveira signed a second contract titled "INDEPENDENT CONTRACTOR OPERATING AGREEMENT" on behalf of Hallmark Trucking LLC, which contains an identical arbitration clause to that in the first agreement. Docket No. 36, Ex. B, at 1, 9-10. The second contract also repeatedly states that the agreement establishes an independent contractor relationship between New Prime and Hallmark Trucking LLC.

Oliveira terminated his contract with New Prime in September 2014. The next month, however, New Prime rehired him as a company driver on the condition that New Prime would continue deducting money from his paychecks to repay an alleged debt to Success Leasing. With these deductions, Oliveira again was paid below the minimum wage. He now brings this class action, arguing that he and other New Prime drivers were not paid the minimum wage under federal and state law.

DISCUSSION

I. Statutory Framework

Congress enacted the FAA in 1925 in "response to hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice." Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 111 (2001). To give effect to this purpose, § 2 of the FAA provides

that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; see also Circuit City, 532 U.S. at 111. In short, § 2 "is a congressional declaration of a liberal federal policy favoring arbitration agreements." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); see also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991). "At a minimum, this policy requires that ambiguities as to the scope of the arbitration clause itself must be resolved in favor of arbitration." PowerShare, Inc. v. Syntel, Inc., 597 F.3d 10, 15 (1st Cir. 2010) (internal quotation marks and alterations omitted).

The Act provides two mechanisms through which federal courts may enforce § 2's liberal policy favoring arbitration. See Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 68 (2010). Section 3 instructs district courts to stay the trial of an action "upon any issue referable to arbitration under an agreement in writing for such arbitration" once the court is "satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement." 9 U.S.C. § 3. Section 4 allows any party "aggrieved" by the failure of another party "to arbitrate under a written agreement for arbitration" to petition a district court for "an order directing that such arbitration proceed in the manner provided for in such agreement." Id. § 4. The district court "shall" order arbitration upon being satisfied that "the making of the agreement for arbitration or the failure to comply therewith is not in issue." Id.

Despite the FAA's broad purpose and strong language, the Act does not extend to all arbitration agreements. Section 2 limits its application to contracts "evidencing a transaction involving commerce," or arising from a "maritime transaction." 9 U.S.C. § 2. More importantly for purposes of the present dispute, § 1, titled "exceptions to operation of title," states "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Id. § 1. Section 1 thus exempts "contracts of employment of transportation workers" from the FAA entirely. Circuit City, 532 U.S. at 119. Employment contracts involving truck drivers fall within the transportation worker exception. See, e.g., Lenz v. Yellow Transp., Inc., 431 F.3d 348, 351 (8th Cir. 2005) (holding that a truck driver, but not a customer service representative, is a transportation worker under § 1); Harden v. Roadway Package Sys., Inc., 249 F.3d 1137, 1140 (9th Cir. 2001) (holding that a truck driver was exempt from the FAA under § 1); Am. Postal Workers Union v. United States Postal Serv., 823 F.2d 466, 473 (11th Cir. 1987) (noting that courts have limited the § 1 exemption to "workers actually engaged in interstate commerce, including bus drivers and truck drivers" (internal quotation marks omitted)).

The FAA does not define the term "contract of employment." See 9 U.S.C. § 1. Although neither the Supreme Court nor the First Circuit has directly addressed the issue, courts generally agree that the § 1 exemption does not extend to independent contractors. See, e.g., Carney v. JNJ Express, Inc., 10 F. Supp. 3d 848, 852-53 (W.D. Tenn. 2014) ("If the [plain-

tiffs] are independent contractors, their claims are arbitrable under the FAA."); Villalpando v. Transguard Ins. Co. of Am., 17 F. Supp. 3d 969, 982 (N.D. Cal. 2014) (same); Port Drivers Fed'n 18, Inc. v. All Saints, 757 F. Supp. 2d 463, 472 (D.N.J. 2011) (same); Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co., 288 F. Supp. 2d 1033, 1035-36 (D. Ariz. 2003) (same). This construction comports well with "the FAA's purpose of overcoming judicial hostility to arbitration," and the Supreme Court's instruction "that the § 1 exclusion provision be afforded a narrow construction" in light of that purpose. Circuit City, 532 U.S. at 118 (holding that § 1 only exempts employment contracts of transportation workers from the FAA's reach, not all employment contracts).[3]

II. Analysis

Oliveira's relationship with New Prime can be divided into three periods of time: (1) March 2013 to May 2013, when Oliveira worked for New Prime through the apprenticeship program and as a B2 company driver trainee; (2) May 2013 to September 2014, when Oliveira worked for New Prime under the two operating agreements; and (3) post-October 2014, when New Prime rehired Oliveira as a company driver.[4] Under the statutory framework discussed above, the FAA's application to the present case hinges on whether Oliveira had a contract of employment or an independent contractor relationship with New Prime—and thus falls within or outside the § 1

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[3] The parties do not dispute that Oliveira was a transportation worker under § 1.

[4] The parties do not specify when Oliveira's relationship with New Prime ended permanently.

transportation worker exemption— during each of these three time periods. New Prime appears to concede that Oliveira was an employee in the first and third time periods, and instead argues that the arbitration clause in the operating agreements should extend retroactively and prospectively to cover these intervals.

More specifically, New Prime maintains that Oliveira's claims from his time as an "employee driver" before signing the operating agreements, and after he was rehired as a company driver, fall within the scope of the arbitration clause for two reasons. Docket No. 51, at 7. First, Oliveira's "allegations related to his time as an employee are inextricably related to his decision to become an independent contractor and enter into the Agreements." Id. Next, New Prime contends that the arbitration clause "is very broad and clearly applies to 'any disputes as to the rights and obligations of the parties.'" Id. (quoting Docket No. 36, Ex. A, at 10, Ex. B, at 9-10). New Prime cites to **Kristian v. Comcast Corp.**, 446 F.3d 25, 33-35 (1st Cir. 2006) for the proposition that an arbitration agreement can be applied retroactively if broadly phrased to include claims or disputes that arose prior to signing the agreement.[5]

At this stage in the proceeding, these arguments fail, because they do not address the applicability of the § 1 transportation worker exemption. If Oliveira was an employee in the first and third time periods,

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[5] New Prime does not cite, and the Court is not aware of, any cases in which a court applied an arbitration agreement to claims arising after termination of the contract containing the arbitration clause.

then the § 1 exemption applies and the Court cannot order the parties to arbitrate any claims that arose before Oliveira signed the operating agreements or after New Prime rehired Oliveira as a company driver in October 2014. That said, the parties dispute whether Oliveira was an employee or independent contractor during at least the second time period, and whether it is for the Court or the arbitrator to decide the threshold question of the FAA's applicability.

A. Gateway Questions of Arbitrability

The Supreme Court has repeatedly emphasized that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942-43 (1995); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). Parties can agree to allow arbitrators decide "gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." Rent-A-Center, 561 U.S. at 68-69 (internal quotation marks and alterations omitted). "An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." Id. at 69. An agreement granting the arbitrator authority to decide threshold questions of arbitrability is generally referred to as a "delegation provision." See id. at 68.

Questions of arbitrability, however, are an exception to the federal policy favoring arbitration agreements. Howsam, 537 U.S. at 83; **Kristian**, 446 F.3d at 37-38. "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." First Options, 514 U.S. at 944 (internal quotation marks and alterations omitted); **see also** Howsam, 537 U.S. at 83 ("The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, *the question of arbitrability*, is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." (internal quotation marks and alterations omitted)). In short, courts must enforce valid delegation provisions under the FAA, but courts scrutinize delegation clauses more closely to ensure the parties manifested a clear intent to delegate questions of arbitrability to the arbitrator.

Here, the parties do not contest that the two operating agreements Oliveira signed on behalf of Hallmark Trucking LLC contain valid delegation provisions. The contracts' arbitration clauses state in relevant part: "ANY DISPUTES AS TO THE RIGHTS AND OBLIGATIONS OF THE PARTIES, INCLUDING THE ARBITRABILITY OF DISPUTES BETWEEN THE PARTIES, SHALL BE FULLY RESOLVED BY ARBITRATION . . ." Docket No. 36, Ex. A, at 10, Ex. B, at 9-10 (emphasis added). Furthermore, as New Prime emphasizes, the arbitration clauses also incorporate the Commercial Arbitration Rules of the American Arbitration Association (AAA). Id. Ex. A, at 10, Ex. B, at 9-10 ("ANY ARBITRATION BETWEEN THE PARTIES WILL BE GOVERNED BY THE COMMERCIAL ABRITRATION RULES OF

THE AMERICAN ARBITRATION ASSOCIATION."). The Rules provide that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." Am. Arbitration Ass'n Commercial Arbitration R. & Mediation P. R-7(a). Thus, the parties have agreed to arbitrate gateway questions of arbitrability.

Oliveira argues that the arbitration clauses, including the delegation provisions, should not be enforced because the operating agreements are substantively and procedurally unconscionable. This argument fails, however, because Oliveira seeks to invalidate the contracts as a whole rather than the delegation provisions, or even the arbitration clauses, specifically. See Rent-A-Center, 561 U.S. at 72 ("Accordingly, unless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator."); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006) ("[A] challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.").

B. Applicability of the Transportation Worker Exemption

The delegation provisions and the AAA Rules do not resolve this matter, because they cannot, and do not, address whether the applicability of the § 1 transportation worker exemption is a question of arbitrability that parties can legally delegate to an arbitral forum in the first place. New Prime argues that the

exemption's application is merely a gateway question of arbitrability that the parties delegated to the arbitrator. Oliveira maintains that "questions regarding statutory exemptions to arbitration agreements" under the FAA, including the § 1 exemption, are not questions of arbitrability at all, but a threshold matter that courts must resolve before considering a motion to compel. Docket No. 40, at 3.

Neither the First Circuit nor Supreme Court has answered the central question in this case: does a district court have to determine the applicability of the FAA § 1 exemption itself, or is the exemption issue just another gateway question of arbitrability that contracting parties may validly delegate to an arbitrator? The Ninth Circuit has held that the "district court must make an antecedent determination that a contract is arbitrable under Section 1 of the FAA before ordering arbitration pursuant to Section 4." In re Van Dusen, 654 F.3d 838, 843 (9th Cir. 2011). Meanwhile, the Eighth Circuit has adopted the opposite viewpoint: it characterizes the applicability of the § 1 exemption as a "threshold question of arbitrability" that parties "can agree to have arbitrators decide." Green v. SuperShuttle Int'l, Inc., 653 F.3d 766, 769 (8th Cir. 2011). This Court finds the Ninth Circuit's analysis more persuasive and adopts its approach for the reasons that follow.

In Green v. SuperShuttle International, Inc., current and former airport shuttle bus drivers brought suit against SuperShuttle "alleging violations of the Minnesota Fair Labor Standards Act (MFLSA) arising from SuperShuttle's alleged misclassification of its drivers as franchisees rather than employees." Id.

at 767. The bus drivers had all signed the same franchise agreement that contained both an arbitration clause and a delegation provision. Id. at 768. When SuperShuttle moved to compel arbitration under the agreement and § 4 of the FAA, Green—on behalf of all the drivers—argued that "the district court lacked jurisdiction to compel arbitration because the FAA exempts transportation workers." Id. at 768-69.

The Eight Circuit held that the application of the § 1 transportation worker exemption "is a threshold question of arbitrability in the dispute between Green and SuperShuttle." Id. at 769. The court emphasized that the franchise agreements "specifically incorporated the Rules of the American Arbitration Association (AAA)," which "provide that an arbitrator has the power to determine his or her own jurisdiction over a controversy between the parties." Id. at 769. The court concluded that by incorporating the AAA Rules, "the parties agreed to allow the arbitrator determine threshold questions of arbitrability," and "thus the district court did not err in granting the motion to compel arbitration." Id.

In contrast, when faced with an analogous scenario, the Ninth Circuit analyzed whether the district court must assess the applicability of the § 1 exemption before ordering arbitration in detail. In In re Van Dusen, two interstate truck drivers entered "independent contractor operating agreements" with Swift Transportation Company. 654 F.3d at 840. The agreements contained both an arbitration clause and a delegation provision. Id. at 840-42. Despite these provisions, the plaintiffs filed suit against Swift and Interstate Equipment Leasing, Company in federal district

court alleging violations of the FLSA and of California and New York labor laws. Id.

The In re Van Dusen defendants moved to compel arbitration pursuant to the arbitration clauses in the operating agreements, and the plaintiffs retorted that the contracts were exempt from arbitration under § 1 of the FAA. Id. The district court "declined to rule on the applicability of the exemption, holding that the question of whether an employer/employee relationship existed between the parties was a question for the arbitrator to decide in the first instance." Id. After the district court denied certification for an interlocutory appeal, the plaintiffs sought mandamus relief from the Ninth Circuit. Id.

The Ninth Circuit held[6] that the applicability of the § 1 transportation worker exemption is not a question of arbitrability that the parties may delegate to an arbitrator. Id. at 843-45. The court explained that because a "district court's authority to compel arbitration arises under Section 4 of the FAA," a district court "has no authority to compel arbitration under Section 4 where Section 1 exempts the underlying contract from the FAA's provisions." Id. at 843. "Section 4 has simply no applicability where Section 1 exempts a contract from the FAA, and private parties cannot, through the insertion of a delegation clause, confer authority upon a district court that Congress chose to withhold." Id. at 844. The court emphasized that "whatever the contracting parties may or may not have agreed upon is a distinct inquiry from whether

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[6] Actually, the Ninth Circuit denied mandamus because the district court's decision was not clearly erroneous under the stringent standard for a writ of mandamus. Id. at 845-46.

the FAA confers authority on the district court to compel arbitration." Id.

As the Ninth Circuit highlighted, its holding is consistent with the Supreme Court's decision in Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956). See In re Van Dusen, 654 F.3d at 844 (citing Bernhardt, 350 U.S. at 201-02). In Bernhardt, the Supreme Court held that a district court lacked authority to stay litigation pending arbitration under § 3 of the FAA where the underlying contract containing the arbitration agreement did not evidence a "transaction involving commerce" within §§ 1 and 2 of the Act. Bernhardt, 350 U.S. at 201-02. The In re Van Dusen court concluded that this reasoning regarding the relationship between Sections 1, 2, and 3 of the Act "applies with equal force in interpreting the relationship between Sections 1, 2, and 4 of the FAA." In re Van Dusen, 654 F.3d at 844. Based on this analysis, this Court holds that the question of whether the § 1 exemption applies is for the Court, and not the arbitrator, to decide.

New Prime argues that the arbitrator must decide whether the § 1 exemption applies because otherwise the Court would address the merits of the underlying dispute. More specifically, New Prime maintains that "the issue of whether the Plaintiff was an independent contractor or an employee is plainly entangled in the merits of Plaintiff's underlying claims arising out of his alleged misclassification." Docket No. 51, at 6. On

a second appeal in the Van Dusen case,[7] the Ninth Circuit rejected a similar argument, stressing that its prior opinion "expressly held that a district court must determine whether an agreement for arbitration is exempt from arbitration under § 1 of the [FAA] as a threshold matter." Id. The Ninth Circuit directed the district court to "determine whether the Contractor Agreements between each appellant and Swift are exempt under § 1 of the FAA" before considering Swift's motion to compel on remand. Id. Thus, this Court must keep on trucking in the present case to determine whether the two operating agreements Oliveira signed on behalf of Hallmark Trucking LLC are contracts of employment within the § 1 exemption.

ORDER

The defendant's motion to compel arbitration and stay proceedings, and/or dismiss the case for improper venue, or, in the alternative, to dismiss Count III for failure to state a claim (Docket No. 35) is **DENIED** without prejudice. The parties may conduct factual discovery on the threshold question of the plaintiff's status as an employee or independent contractor until January 8, 2016. Any motions for summary judgment shall be filed by January 22, 2016.

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[7] After the Ninth Circuit denied the writ of mandamus, the plaintiffs moved "for reconsideration of the grant of Swift Transportation Co. Inc.'s motion to compel arbitration." Van Dusen v. Swift Transp. Co., Inc., 544 Fed. App'x 724, 724. The district court denied the motion for reconsideration, but certified a request for an interlocutory appeal. Van Dusen v. Swift Transp. Co., No. 2:10-CV-00899 JWS, 2011 WL 3924831, at *3 (D. Ariz. Sept. 7, 2011).

/s/ PATTI B. SARIS.

Patti B. Saris
Chief United States District Judge

APPENDIX D

INDEPENDENT CONTRACTOR OPERATING AGREEMENT

THIS AGREEMENT is made and entered into this 31 day of May 2013 , by and between NEW PRIME, INC. ("Prime") and ("Contractor" or "You").

Prime is a for-hire motor carrier and utilizes independent contractors to assist in its business. You are willing to lease the following-described tractor (the "Equipment") to Prime for the purpose of hauling freight pursuant to the terms and conditions of this Agreement: 1 Year 2012 Make FRGHT Serial No. 1FUJGLDR9CSBA3671 License No. 12AR5H State MO;

NOW, THEREFORE, in consideration of the mutual covenants herein contained and for other good and valuable consideration, it is hereby agreed as follows:

1. LEASE. You hereby lease to Prime the Equipment from the date of this Agreement—through December 31 of the same year. Thereafter, this Agreement shall continue from year to year unless otherwise terminated as provided herein. During the term of this Agreement; Prime shall have exclusive possession, control and use of the Equipment and complete responsibility for the operation of the Equipment. The provision in the preceding sentence is set forth solely to conform with federal regulations and is not to be used for any other purposes, including any attempt to classify You as an employee of Prime. 49 CFR 376.12

(c) (4) provides that nothing in the provisions required by 49 CFR 376.12 (c) (1) is intended to effect whether You or any driver provided by You is an independent: contractor or an employee of the Carrier.

Prime shall retain the original of this Agreement, a signed copy shall be maintained in each piece of the Equipment, and one signed copy shall be maintained by You.

2. SERVICE. The parties agree that the intent of this Agreement is to establish an independent contractor relationship at all times. You agree to make the Equipment available to Prime, with qualified and Prime Certified drivers, to pick up loads and transport them to; destinations designated by various shippers. You shall determine the means and methods of performance of all transportation services undertaken under the terms of this Agreement, including driving times and deliver routes. You may refuse to haul any load offered to You by Prime. You have the right to provide services for another carrier during the term of this Agreement, provided that (i) You remove all identification devices, licenses and base plate's from the Equipment and return to Prime, and (i.i.) You provide Prime five (5) business days u notice of Your intent to provide services for another carrier.

3. PAYMENT. Prime shall play You amounts,' as itemized on Schedule 1 within fifteen (15) days after You give Prime properly completed logs and al documents required by the shippers of loads You haul in order for Prime to be paid. All such payments shall be reflected In an operator's settlement which Prime shall produce both on a weekly basis and as a final statement following termination (the "Settlement").

Upon termination of this Agreement, Your final payment is contingent upon Your removal of all Prime identification devices. Prime will be entitled to recover from You those devices in the form of decals or placards on the Equipment and return of those devices to Prime in the manner specified in paragraph 7(d) hereof, unless they are painted directly on the Equipment, together with all of Your Comdata cards. If an identification device has been lost or stolen, a letter certifying that fact shall suffice. Payment to You shall be made contingent upon submission of a bill of lading to which no exceptions shall be taken.

4. QUALCOMM. Your Equipment must contain a Qualcomm unit which will work in conjunction with Prime's Qualcomm System. You hereby authorize Prime to deduct amounts specified in Schedule from Your Settlement to make such rental payments together with all monthly usage fees, including Excess message charges. You are responsible for the timely return of any rented Qualcomm device upon the termination: of this Agreement. If you lease a Qualcomm unit from Prime land if the unit is damaged or lost You agree to reimburse Prime the entire cost incurred by Prime in repairing or replacing the unit. You hereby authorize Prime to deduct an amount equal to the cost from Your Settlement at such time as Prime chooses. If the unit is not returned upon termination, You agree to reimburse Prime its cost incurred in replacing the unit and You hereby authorize Price to deduct such cost from Your final Settlement. If funds are not available to do so, You agree to pay Prime its cost of collection including reasonable attorney's fees.

5. ADVANCES. If You have secured advances from Prime, You hereby authorize Prime to deduct an

amount equal to the advances from Your Settlement at such time as Prime chooses.

6. **TRAILER INSPECTION**. You agree to make a visual inspection prior to assuming control of trailers furnished by Prime: and immediately report any existing damage or defects, and also to report any damage that occurs while the trailer is under Your control. If You fail Ito report any existing damage or defects prior to assuming control of the trailer, and the next driver following You who assumes controlled that trailer reports damage or defects prior to his assuming control, then You agree to pay to Prime the actual cost of repairing such damage or defects.' You hereby authorize Prime to deduct from Your Settlement lament an amount equal to the cost of repair.

7. **PERFORMANCE BOND.**

(a) Amount and Set Off. You will deposit with Prime One Thousand Dollars ($1,000.00) as security for the full performance of Your financial obligations to Prime as set forth in this Agreement. Prime may set off any part of the Performance Bond against (i) cash advances made by Prime to You or for the benefit of Your drivers; (ii) all expenses specifically itemized in paragraphs 8, 9 and 10 hereof; (iii) all costs of Your insurance for coverages itemized in paragraph 11 hereof which Prime has advanced payment for; (iv) automobile liability, cargo and trailer damage claims for which You are liable to Prime as set forth in paragraph 12 hereof; (v) all amounts charged by Prime pursuant to paragraph 13 hereof; (vi) advances made to You or on Your behalf as specified in Schedule 2 hereof; (vii) all amounts charged You by Prime or paid on Your behalf by Prime as itemized on Schedule 3

hereof and accounted for in Your Weekly Settlement; (viii) advances set forth in paragraph 29; and (ix) all other obligations incurred by You, which have been specified in this Agreement. If Performance Bond funds are set puff, You shall provide additional money so that the Performance Bond equals One Thousand Dollars ($1,000.00). In the event You fail to replenish the Performance Bond as required, You hereby authorize Prime to deduct from Your Settlement amounts necessary to replenish the Performance Bond as required. If you do not deposit the full amount of the Performance Bond, You authorize Prime to deduct from Your Settlement the amounts indicated in Schedule 3 in order to fulfill this obligation.

(b) Interest. Prime will pay You interest on the Performance Bond quarterly. This Interest rate shall be equal to the average yield on Ninety-One (91) Day, Thirteen (13) Week Treasury Bills as established in the weekly auction by the Department of the Treasury.

(c) Accounting. Prime will provide You an accounting of the Performance Bond it any time requested by You. Prime shall also indicate on Your Settlement sheets the amounts and description of any deductions or additions made to the Performance Bond.

(d) Return. Upon termination of this Agreement, in order to have the Performance 55M—Returned to You, You must first return to Prime all of Prime's placards and other identification devices, other than those painted directly on the Equipment; Your Comdata card, all base plates, permits, licenses, pre-pass toll transponder, properly completed logs

and documents necessary to receive payments for trips made under this Agreement, You may either bring these items to Prime's terminal or deliver them to Prime via mail or other form of conveyance of Your choice. If You bring the Equipment to Prime's terminal Prime will remove all identification devices. If not, You shall be responsible for their removal. Prime shall provide a final accounting, itemizing all deductions, and return all amounts due You from the Performance Bond within forty-five (45) days of the termination.

8. EXPENSES. You shall pay all operating and maintenance expenses in connection with the operation of the Equipment, including but not limited to fuel, fuel taxes, Federal Highway Use Taxes, tolls, ferries, detention, accessorial services, tractor repairs and Seventy-Two percent (72%) of any agent or brokerage fees charged against line haul revenues received by Prime for any freight transported by You. At your request, Prime will make advances for the payment of such expenses, and You hereby authorize Prime to deduct from Your Settlement amounts equal to the advances. Except when a violation results from Your acts or omissions, Prime shall assume the risk and costs of fines for overweight and oversized trailers when the trailers are preloaded, sealed, or the load is containerized) or when the trailer or lading is otherwise outside Your control, and for improperly permitted over-dimensions and overweight loads. Prime shall reimburse You for any fines paid by You which are Prime's responsibility. You shall be responsible for loading and unloading of trailers.

9. LICENSES, PERMITS AND AUTHORIZATIONS.

(a) **Purchase**. You are required to obtain, at Your expense, a base plate under the international Registration Plan("IRP") permitting the Equipment to be operated in all forty-eight (48), contiguous states. Alternatively, You may authorize Prime to obtain on Your behalf, but at Your expense, all licenses, permits, IRP base plates and authorizations required .for operation of the Equipment. Upon such authorization You agree to reimburse Prime for such expenses, and You hereby authorize Prime to make the deductions from Your Settlement amounts as set forth in Schedule 3.

(b) Return. During the term of the Agreement, as well as after termination, all licenses, permits, base plates; pre-pass toll transponder and authorizations, as well as all placards, provided to You by Prime shall be the property of Prime, and upon termination of this Agreement, You shall, within seven (7) days return all such licenses, permits, base plates, pre-pass toll transponder, placards and authorizations to Prime. All identification devices shall be returned in the manner specified in paragraph 7(d) hereof. Any unused portion of the base plate will be credited to You if Prime receives a refund or credit from the issuing authority or upon transfer to any other vehicle in Prime's fleet.

10. **DRIVERS**. You shall (i) drive the Equipment Yourself, (ii) employ, on Your own behalf, drivers for the Equipment, or (iii) lease drivers for the Equipment.

(a) **Contractor's Employees**. If You employ, on Your own behalf drivers for the Equipment, you shall be sole. responsible for payment of their

wages, benefits, Social Security taxes, withholding taxes unemployment insurance fees, and all other amounts required government agencies to be paid by employers on behalf of or to employees. All by drivers employed by You to operate the Equipment shall be qualified so as to meet requirements of all federal, state and local laws and the rules, and regulations of the Department of Transportation. All such drivers must first be certified by Prime. You shall likewise employ on Your Own behalf and' at Your own expense all driver's helpers and other laborers required to carry out the purpose of this Agreement. At Your request, Prime shall' make payments to Your employees and for their benefit and on their behalf. You shall reimburse Prime for all such expenses and hereby authorize Prime to deduct from Your Settlement amounts required to make such reimbursements. All such reimbursements shall be equal to payments made by Prime.

(b) Leased Drivers. If You lease drivers for the Equipment, You hereby authorize Prime to make advances for all amounts required to reimburse the leasing entity with whom You contracted for services of the drivers. You shall reimburse Prime for all such, expenses and hereby authorize Prime to deduct from your Settlement amounts required to make such reimbursements. All such reimbursements shall be equal to payments made by Prime. All Leased Drivers must first be certified by` rime.

11. INSURANCE

(a) Liability. Prime shall provide and maintain auto liability insurance for the protection of the public pursuant to FMCSA Regulations under 49

USC 13906. Said liability insurance may not necessarily insure You against loss.

(b) **Non-Trucking Use Auto Liability Coverage**. You shall provide and maintain at Your own expel-se non-trucking use auto liability insurance coverage. This coverage, whether referred to As "bobtail", unladened", "deadhead" or otherwise, shall provide coverage for all risks for movement of the Equipment when it is not under dispatch by Prime. Prime shall be named as an additional insured on the policy, which shall 'have limits of not less than $1 million per occurrence, CSL. This policy of insurance shall be primary to and without right of contribution from all other insurance available to Prime.

(c) **Cargo Insurance**. Prime shall secure and maintain Cargo Liability Insurance.

(d) **Physical Damage Insurance**. Prime shall provide and maintain at its own expense physical damage insurance on its trailers.

(e) **Occupational Injuries**. You shall either (i) make an election to procure Workers' Compensation Insurance protection against injuries sustained while in pursuit of Your] business, for Yourself and Your drivers, and thereafter provide and maintain at Your own expense such insurance; or (ii) provide and maintain at Your expense a suitable alternative insurance, such as occupational accident insurance, for Yourself and Your drivers, which insurance must be approved by Prime.

(f) **Health and Life Insurance**. You may elect to purchase health and life insurance through Prime.; It You do sod You hereby authorize Prime to deduct such cost from Your Settlement. Because such

insurance may not go into effect at the time of the execution of this Agreement, and the premiums may change from time to time, You agree that the 'provisions of paragraph 18 of this Agreement apply to such deductions. The cost of this insurance shall be the actual premium charged by the 'insurance company. However, under some health policies of insurance which Prime purchases, a portion of the premium may be retained by Prime in a claims pool for the purpose of paying claims. If, at the end of the policy period, there are any funds remaining in the claims pool, Prime retains those funds.

(g) Procuring of Insurance by Prime. Upon Your request, an insurance broker working with Prime and knowledgeable of the requirements within this Agreement will provide You with coverage information and applications for insurance coverage required of You by this Agreement. If You elect to procure insurance through that insurance broker, You hereby authorize Prime to deduct the cost of such insurance from Your Settlement and forward those amounts to such insurance broker. The cost of all such insurance coverages shall be itemized On Schedule 3 of this Agreement. Prime, or the insurance broker, will furnish to You a certificate of insurance for each policy You purchase and a copy of leach policy shall be furnished to You upon request. You shall remain financially responsible to the insurance broker and/or insurer for any insurance costs not paid due to an insufficiency of Settlement funds.

(h) Proof of Insurance. All insurance coverage provided by You as required by this Agreement shall be in form and 'substance, and issued by a company satisfactory to Prime. You shall continuously

provide Prime with proof of such insurance either by ',current binder or certificates of insurance from the date of the execution of this Agreement until its termination.

12. ACCIDENTS, CLAIMS, LOSSES AND EXPENSES.

(a) **Auto Liability**. Prime and its auto liability insurer may settle any claim against Prime arising out of the maintenance, use or control of the Equipment. You shall pay Prime Up to Five Hundred Dollars ($500.00) per occurrence for the settlement of any such claim and related expenses.

(b) Cargo. You shall pay Prime up to Five Hundred Dollars ($500.00) per occurrence toward the settlement of cargo losses directly caused by fire, collision, overturning of vehicle, collapse of bridges or docks, rising navigable waters oil river floods, perils of the seas, lakes, rivers or inland water while on ferries only, and cyclone, tornado or windstorm. If cargo losses are caused by any peril other than those itemized above, You will pay Prime that portion of such losses and expenses for which Prime does not receive payment from their insurance carrier.

(c) **Damage to Trailers**. You shall pay Prime up to Five Hundred Dollars ($500.00) per occurrence toward loss of, damage to, or liens for storage with respect to Prime's trailers which: are used by You when such losses are covered by Prime's insurance. When 'the loss of, damage to, or liens for storage of Prime's trailers which are used by You are not covered by insurance, You shall pay for all such losses, including expenses and attorneys' fees.

(d) Authorization to Deduct. You Hereby authorize Prime to deduct from Your Settlement all amounts due Prime under this paragraph 12. Prime shall provide You with a written explanation and itemization of any such deductions for cargo or property damage before such deductions are made.

(e) **HOLD HARMLESS AND INDEMNIFICATION**. YOU **AGREE** TO **INDEMNIFY** AND **HOLD HARMLESS PRIME**, ITS **AFFILIATED** COMPANIES AND THEIR RESPECTIVE OFFICERS, DIRECTOR, **SHAREHOLDERS, EMPLOYEES, AGENTS**, SUCCESSORS **AND ASSIGNS, FROM AND AGAINST ANY AND ALL LIABILITIES AND** EXPENSES WHATSOEVER, INCLUDING, WITHOUT LIMITATION, CLAIMS, DAMAGES, JUDG**MENTS, AWARDS, SETTLEMENTS, INVESTIGATIONS, COSTS AND ATTORNEY'S FEES (COLLECTIVELY, "CLAIMS") WHICH ANY OF THEM MAY INCUR OR BECOME OBLIGATED TO PAY ARIS**ING OUT OF YOUR ACTS OR OMISSION OR THOSE OF YOUR AGENTS AND EMPLOYEES (INCLUDING DRIVERS LEASED YOUR PRIME). YOU FURTHER AGREE TO HOLD PRIME HARMLESS AND TO INDEMNIFY PRIME AGAINST ALL CLAIMS BY YOU AND YOUR AGENTS AND EMPLOYEES. I UNDERSTAND THAT THIS PARAGRAPH LIMITS MY RIGHTS AND I ACKNOWLEDGE MY OPTION TO SEEK INDEPENDENT LEGAL COUNSEL AND ADVICE.

13. OPERATING STATEMENT AND PAYROLL SERVICES. At your request, Prime may provide You with an operating statement, and You nearby authorize Prime to make a deduction from Your Settlement an amount as set forth in Schedule 3. In the event

Primero vides services for Your co-drivers, You hereby authorize Prime to make a deduction from Your Settlement in amount as set forth in Schedule 3.

14. CITATIONS. At Your request, Prime shall provide You with administrative services in connection with citations You receive while operating under Prime's authority, and advance money for payment of them. You agree to pay and hereby authorize Prime to deduct from Your Settlement an amount equal to the fee as set forth in Schedule 3, as well as an amount equal. to the payment made ion Your behalf. You are under no obligation to submit Your citations to Prime for handling. However, You agree to report all citations to Prime.

15. FUEL CARD EXPRESS CODES TRIP EXPRESS CHARGE. You agree that, in in the event You utilize Prime's fuel card system and express code transaction system, You will pay to Prime and hereby authorize Prime to deduct from Your Settlement an amount as set forth in Schedule 3.

16. TRACTOR PAYMENT DEDUCTION (IF APPLICABLE). You are leasing X or purchasing _ (check one) Your tractor from SUCCESS LEASING Your payments are itemized in Schedule 2 attached hereto and made a part hereof. In addition, You are required by Your lessor or lender to place certain sums in reserve accounts as itemized in schedule 2. By initialing Schedule 2 You authorize and request Prime to deduct those sums itemized in Schedule 2 from Your Settlement and forward them to Your lessor or lender. If the agreement with Your lessor or lender authorizes Prime to make deductions from Prime's Settlement with You for rental or purchase payments, You must

(d) Authorization to Deduct. You Hereby authorize Prime to deduct from Your Settlement all amounts due Prime under this paragraph 12. Prime shall provide You with a written explanation and itemization of any such deductions for cargo or property damage before such deductions are made.

(e) HOLD HARMLESS AND INDEMNIFICATION. YOU AGREE TO INDEMNIFY AND HOLD HARMLESS PRIME, ITS AFFILIATED COMPANIES AND THEIR RESPECTIVE OFFICERS, DIRECTOR, SHAREHOLDERS, EMPLOYEES, AGENTS, SUCCESSORS AND ASSIGNS, FROM AND AGAINST ANY AND ALL LIABILITIES AND EXPENSES WHATSOEVER, INCLUDING, WITHOUT LIMITATION, CLAIMS, DAMAGES, JUDGMENTS, AWARDS, SETTLEMENTS, INVESTIGATIONS, COSTS AND ATTORNEY'S FEES (COLLECTIVELY, "CLAIMS") WHICH ANY OF THEM MAY INCUR OR BECOME OBLIGATED TO PAY ARISING OUT OF YOUR ACTS OR OMISSION OR THOSE OF YOUR AGENTS AND EMPLOYEES (INCLUDING DRIVERS LEASED YOUR PRIME). YOU FURTHER AGREE TO HOLD PRIME HARMLESS AND TO INDEMNIFY PRIME AGAINST ALL CLAIMS BY YOU AND YOUR AGENTS AND EMPLOYEES. I UNDERSTAND THAT THIS PARAGRAPH LIMITS MY RIGHTS AND I ACKNOWLEDGE MY OPTION TO SEEK INDEPENDENT LEGAL COUNSEL AND ADVICE.

13. OPERATING STATEMENT AND PAYROLL SERVICES. At your request, Prime may provide You with an operating statement, and You nearby authorize Prime to make a deduction from Your Settlement an amount as set forth in Schedule 3. In the event

Primero vides services for Your co-drivers, You hereby authorize Prime to make a deduction from Your Settlement in amount as set forth in Schedule 3.

14. **CITATIONS**. At Your request, Prime shall provide You with administrative services in connection with citations You receive while operating under Prime's authority, and advance money for payment of them. You agree to pay and hereby authorize Prime to deduct from Your Settlement an amount equal to the fee as set forth in Schedule 3, as well as an amount equal. to the payment made ion Your behalf. You are under no obligation to submit Your citations to Prime for handling. However, You agree to report all citations to Prime.

15. FUEL CARD EXPRESS CODES TRIP EXPRESS CHARGE. You agree that, in in the event You utilize Prime's fuel card system and express code transaction system, You will pay to Prime and hereby authorize Prime to deduct from Your Settlement an amount as set forth in Schedule 3.

16. TRACTOR PAYMENT DEDUCTION (IF APPLICABLE). You are leasing X or purchasing _ (check one) Your tractor from SUCCESS LEASING Your payments are itemized in Schedule 2 attached hereto and made a part hereof. In addition, You are required by Your lessor or lender to place certain sums in reserve accounts as itemized in schedule 2. By initialing Schedule 2 You authorize and request Prime to deduct those sums itemized in Schedule 2 from Your Settlement and forward them to Your lessor or lender. If the agreement with Your lessor or lender authorizes Prime to make deductions from Prime's Settlement with You for rental or purchase payments, You must

provide Prime with a copy of that agreement and It shall be attached to this Agreement and made a part hereof by this reference.

17. ADDITIONAL SETTLEMENT DEDUCTIONS. From time to time, You may purchase fuel, products or services, including repairs, which are charged to Prime. When You do so, You hereby authorize Prime to deduct from Your Settlement amounts equal to such charges. You are never required to charge any amounts to Prime's account not to make purchases from any vendor recommended by Prime. Further, if You lease Your tractor, You may be required by Your lessor to indemnify Your lessor for claims arising out of Your acts and omissions as well as those of Your agents and employees, and to pay for portions of any loss or damage to Your tractor, When Your lease requires any such payments, You hereby authorize Prime to deduct from Your settlement amounts equal to such charges.

18. RATIFICATION OF DEDUCTIONS. In paragraphs 4, 5, 6, 7, 8, 9, 10, 11(f), 12, 14, 17 and 1-9 at this Agreement, Prime has agreed to make certain advances to You or on Your behalf. You have agreed to allow Prime to make deductions from Your Settlement as reimbursement for those advances. Because those advances are not capable of determination at the time of the execution of this Agreement, they shall be disclosed to You from time to time in Your Settlement. To the extent Prime is required to disclose deductions to You, that requirement regarding any such deductions shall be deemed fulfilled through Prime providing You with a Settlement. However, upon request, Prime will provide You copies of those documents which are necessary to determine the validity of the

charge. Computation of each item shall be on the basis of, the actual amount of each advance, charge or expense. If You have not objected to any such deduction in writing within ninety (90) days of the date of the Settlement, the deduction shall be deemed ratified by You.

19. NEGATIVE BALANCE. If You have a negative balance on Your Settlement after calculating all payments dud You less all deductions authorized herein, and if Prime has not offset that negative amount, against Your security deposit, You agree to pay to Prime interest On such negative balance at a rate equal to the average yield on Ninety-One-Day, Thirteen-Week Treasury Bills as established in the weekly auction by the Department of Treasury. Interest shall be paid on the average weekly amount of Your negative balance.

If You have a substantial negative balance on that Your cash flow is affected, and if Prime agrees, You may convert some or all of that negative balance to periodic payments to Prime (the "Advance"). In that event You and Prime shall agree on the frequency of payments and You agree to pay to Prime interest on the Advance at the rate of 12% per annum. Provided, however in the event the Prime Rate (of U. S. money center commercial banks as published in The Wall Street Journal) shall equal or exceed 10%, You agree to pay to Prime interest on the Advance at the Prime Rate plus 2%.

20. FREIGHT BILLS AND TARIFFS. Prime shall provide You with a copy of Prime's rated freight bill or a computer-generated document containing the same information, and, upon request, You shall have

the right to examine Prime's tariffs at all reasonable times, as well as documents from which contract rates and charges are computed. Mileage is based on the latest version of the Household Goods Carrier's Bureau Mileage Guide, unless otherwise specified by Prime's customers.

21. **PRIME'S SERVICES, PRODUCTS AND EQUIPMENT**. You shall not be required to purchase or rent any products, equipment or services from Prime as a condition of entering into this Agreement. In the event that You elect to purchase or rent any products, equipment or services from or through Prime, You agree that Prime may deduct amounts due for such products, equipment or services from the compensation due You. You and Prime agree that such amounts will include the cost of such products equipment or services and may include amounts to cover Prime's administrative costs, either direct or indirect, of securing, offering and maintaining such products, equipment and services.

22. **TERMINATION**. Either party may Terminate this Agreement by giving (30) days written notice of such intention to the other party. In the event either party commits a material breach of this Agreement, the other shall have the right to terminate this Agreement by giving five (5) days' written notice of such intention. Shipping requirements of Prime's customers are an essential part of Prime's business, and failure to adhere to such requirements may be deemed to be a material breach of this Agreement. The DOT has charged Prime with the duty of requiring You to observe safety standards while operating the Equipment under Prime's authority. It is agreed that Prime may

terminate this Agreement immediately if it has information or knowledge or belief that the safety of the public is, being endangered by You or Your agents or employees in the operation of the Equipment. In the event this Agreement is terminated by either party or upon the expiration of this Agreement You shall, within forty-eight (48) hours, return all of Prime's property to Prime at a location specifically designated by Prime. If You shall fail to return Prime's property as provided herein, You shall be responsible for all expenses incurred by Prime in securing the proper return of said property. Such expenses may be charged back against any amounts owed You by Prime.

23. NOTICES. All notices, requests, instructions, consents and other communications to be given pursuant to this Agreement shall be in writing and shall be deemed received (i) on the same day if delivered in person, by same day courier or by telegraphy telex or facsimile transmission; (ii) on the next day if delivered by overnight mail or courier; or (iii) on the date indicated on the return receipt, or if there is no such receipt, on the third calendar day (excluding Sundays) if delivered by certified or registered mail, postage prepaid, to the party for whom intended to the following addresses:

If to Prime: Manager, Contractor Relations
P.O. Box 4208
Springfield, MO 65808

If to Contractor: HALLMARK TRUCKING LLC
40 DUGGAN DR
LEOMINSTER MA 01453

Each party may, by written notice given to the other in accordance with this Agreement, change the address to which notices to such party are to be delivered.

24. **RELATIONSHIP OF PARTIES.** The parties intend to create by this Agreement the relationship of carrier and Independent Contractor and not an employer/employee relationship. You are and shall be deemed for all purposes to be an Independent Contractor 'not an employee of Prime. Neither You, Your employees, agents or servants, if any, are to be considered employees of Prime at any time, under any circumstance or for any purpose.

25. **ASSIGNMENT**. You shall not assign this Agreement or any rights or obligations hereunder to anyone Without the written consent of Prime.

26. **DESIGNATION OF PAYEE**. You agree that, in the event there is more than one (1) individual named as the Contractor on the face age of this Agreement, that those persons so named will designate in writing which one of them shall be entitled to receive the weekly Settlement check due under the terms of this Agreement. Any change in such designation must be in writing and must be executed by all individuals named as Contractor herein. The purpose of this paragraph is to allow Prime to make one (1) Settlement check payable to one (1) of the individuals named as Contractor without retaining any exposure whatsoever for payment to the other named Contractor.

The following named Co-Contractor is hereby designated as the individual to receive all weekly Settlement checks in this name only:

APPROVED: _____

_____

27. MODIFICATION OF SCHEDULES. From time to time during the term of this Agreement amounts required to purchase insurance from a Prime affiliate or through Prime, lease or purchase payments, reserve account requirements, Qualcomm user fees and other like items may be changed from those amounts set forth on the Schedules attached hereto by the person making such charges, In such event and upon receipt in writing of notice of such modification by Prime from the person making the modification, Prime shall notify You in writing of such change. Unless You instruct Prime in writing to the contrary within ten (10) days of the date of Prime's notice to You, the appropriate Schedule shall be deemed modified to reflect the new amount bring charged and the Schedule shall be deemed by the parties as being amended accordingly.

28. SET-OFF. You hereby rant to Prime the right of immediate set off against Your weekly Settlement of all amounts due from You to Prime under the terms of this Agreement.

29. LEASE EXPENSES ADVANCES. If You lease Your Tractor from Success Leasing, Inc. ("Success"), Our Lease contains financial obligations in addition to Lease Charges, Excess Mileage charge and Tire Replacement Reserve. Those additional obligations are foundling paragraphs 10, 12, 14, 15, 17 and 19(d) of Your Lease. Those obligations may be advanced by Success or Prime on Your behalf. In the event they are, You hereby authorize Prime to deduct from Your Settlement or Your Performance Bond

amounts equal to such advances and remit to the entity which made the advance. The amount deducted shall be the actual cost of each such obligation.

30. GOVERNING LAW AND ARBITRATION. THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF THE STATE OF MISSOURI. ANY DISPUTES ARISING UNDER, ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING AN ALLEGATION OF BREACH THEREOF, AND ANY DISPUTES ARISING OUT OF OR RELATING TO THE RELATIONSHIP CREATED BY THE AGREEMENT, AND ANY DISPUTES AS TO THE RIGHTS AND OBLIGATIONS OF THE PARTIES, INCLUDING THE ARBITRABILITY OF DISPUTES BETWEEN THE PARTIES, SHALL BE FULLY RESOLVED BY ARBITRATION IN ACCORDANCE WITH MISSOURI'S ARBITRATION ACT AND/OR THE FEDERAL ARBITRATION ACT, ANY ARBITRATION BETWEEN THE PARTIES WILL BE GOVERNED BY THE COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION (THE RULES"). THE PARTIES SPECIFICALLY AGREE THAT NO DISPUTE MAY BE JOINED WITH THE DISPUTE OF ANOTHER AND AGREE THAT CLASS ACTIONS UNDER THIS ARBITRATION PROVISION ARE PROHIBITED. IN THE EVENT OF CONFLICT BETWEEN THE RULES AND THE PROVISIONS OF THIS AGREEMENT, THE PROVISIONS OF THIS AGREEMENT SHALL CONTROL. EXCEPTIONS/CLARIFICATIONS OF THE RULES INCLUDE: (i) THE PROCEEDINGS SHALL BE CONDUCTED BY A SINGLE, NEUTRAL ARBITRATOR TO BE SELECTED BY THE PARTIES, OR, FAILING

THAT, APPOINTED IN ACCORDANCE WITH THE RULES, (ii) THE SUBSTANTIVE LAW OF THE STATE OF MISSOURI SHALL APPLY, AND (iii) THE AWARD SHALL BE CONCLUSIVE AND BINDING. A DEMAND FOR ARBITRATION SHALL BE FILED NOT LATER THAN ONE (1) YEAR AFTER THE DISPUTE ARISES OR THE CLAIM ACCRUES, AND FAILURE TO FILE SAID DEMAND WITH THE ONE (1) YEAR PERIOD SHALL BE DEEMED A FULL WAIVER OF THE CLAIM. THE PLACE OF THE ARBITRATION HEREIN SHALL BE SPRINGFIELD, MISSOURI. BOTH PARTIES AGREE TO BE FULLY AND FINALLY BOUND BY THE ARBITRATION AWARD, AND JUDGMENT MAY BE ENTERED ON THE AWARD IN ANY COURT HAVING JURISDICTION THEREOF. THE PARTIES AGREE THAT THE ARBITRATION FEES SHALL SPLIT BETWEEN THE PARTIES, UNLESS CONTRACTOR SHOWS THAT THE ARBITRATION FEES WILL IMPOSE A SUBSTANTIAL FINANCIAL HARDSHIP ON CONTRACTOR AS DETERMINED BY THE ARBITRATOR, IN WHICH EVENT PRIME WILL PAY THE ARBITRATION FEES.

31. **ENTIRE AGREEMENT**. This Agreement shall be comprised of this document executed below by You and Prime as well as all Schedules initialed by You (as amended from time to time as herein provided). Together they constitute the entire agreement between the parties hereto and may not be modified or amended except by written agreement executed by both parties or, in the case of the Schedules, as otherwise herein provided.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals on the day and year first written herein.

THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.

NEW PRIME, INC.

By: _____

"Prime"

_____

_____

"Contractor"

By Your initials on this page You acknowledge receipt of a copy of this Agreement from Prime _____

_____

"Co-Contractor"

APPENDIX E

INDEPENDENT CONTRACTOR OPERATING AGREEMENT

THIS AGREEMENT is made and entered into this 12 day of March, 2014, by and between NEW PRIME, INC. ("Prime") and ("Contractor" or "You").

Prime is a for-hire motor carrier and utilizes independent contractors to assist in its business. You are willing to lease the following-described tractor (the "Equipment") to Prime for the purpose of hauling freight pursuant to the terms and conditions of this Agreement: Year 2015 Make FRGHT Serial No.3AKJGLD54FSFN2731 License No. _____ State MO

NOW, THEREFORE, in consideration of the mutual covenants herein contained and for other good and valuable consideration, it is hereby agreed as follows:

1. LEASE. You hereby lease to Prime the Equipment from the date of this Agreement through December 31 of the same year. Thereafter, this Agreement shall continue from year to year unless otherwise terminated as provided herein. During the term of this Agreement, Prime shall have exclusive possession, control and use of the Equipment and complete responsibility for the operation of the Equipment. The provision in the preceding sentence is set forth solely to conform with federal regulations and is not to be used for any other purposes, including any attempt to classify You as an employee of Prime. 49 CFR 376.12

(c) (4) provides that nothing in the provisions required by 49 CFR 376.12 (c) (1) is intended to effect whether You or any driver provided by You is an independent contractor or an employee of the Carrier.

Prime shall retain the original of this Agreement, a signed copy shall be maintained in each piece of the Equipment, and one signed copy shall be maintained by You.

2. SERVICE. The parties agree that the intent of this Agreement is to establish independent contractor relationship at all times. You agree to make the Equipment available to Prime, with qualified and Prime Certified drivers, to pick up loads and transport them to destinations designated by various shippers. You shall determine the means and methods of performance of all transportation services undertaken under the terms of this Agreement, including driving times and delivery routes. You may refuse to haul any load offered to You by Prime. You have the right to provide services for another carrier during the term of this Agreement, provided that (i) You remove all identification devices, licenses and base plates from the Equipment and return to Prime, and (ii) You provide Prime five (5) business days' notice of Your intent to provide services for another carrier.

3. PAYMENT. Prime shall pay You amounts as itemized on Schedule 1 within fifteen (15) days after You give Prime properly completed logs and all documents required by the shippers of loads You haul in order for Prime to be paid. All such payments shall be reflected in an operator's settlement which Prime shall produce both on a weekly basis and as a final statement following termination (the "Settlement").

Upon termination of this Agreement, Your final payment is contingent upon Your removal of all Prime identification devices. Prime will be entitled to recover from You those devices in the form of decals or placards on the Equipment and return of those devices to Prime in the manner specified in paragraph 7(d) hereof, unless they are painted directly on the Equipment, together with all of Your Comdata cards. If an identification device has been lost or stolen, a letter certifying that fact shall suffice. Payment to You shall be made contingent upon submission of a bill of lading to which no exceptions shall be taken.

4. QUALCOMM. Your Equipment must contain a Qualcomm unit which will work in conjunction with Prime's Qualcomm system. You hereby authorize Prime to deduct amounts specified in Schedule 3 from Your Settlement to make such rental payments together with all monthly usage fees, including Excess message charges. You are responsible for the timely return of any rented Qualcomm device upon the termination of this Agreement. If you lease a Qualcomm unit from Prime, and if the unit is damaged or lost, You agree to reimburse Prime the entire cost incurred by Prime in repairing or replacing the unit. You hereby authorize Prime to deduct an amount equal to the cost from Your Settlement at such time as Prime chooses. If the unit is not returned upon termination, You agree to, reimburse Prime its cost incurred in replacing the unit and You hereby authorize Prime to deduct such cost from Your final Settlement. If funds are not available to do so, You agree to pay Prime its cost of collection including reasonable attorney's fees.

5. ADVANCES. If You have secured advances from Prime, You hereby authorize Prime deduct an

amount equal to the advances from Your Settlement at such time as Prime chooses.

6. **TRAILER INSPECTION**. You agree to make a visual inspection prior to assuming control of trailers furnished by Prime and immediately report any existing damage or defects, and also to report any damage that occurs while the trailer is under Your control. If You fail to report any existing damage or defects prior to assuming control of the trailer, and the next driver following You who assumes control of that trailer reports damage or defects prior to his assuming control, then You agree to pay to Prime the actual cost of repairing such damage or defects. You hereby authorize Prime to deduct from Your Settlement an amount equal to the cost of repair.

7. **PERFORMANCE BOND.**

(a) **Amount and Set Off**. You will deposit with Prime Fifteen Hundred Dollars ($1,500.00) as security for the full performance of Your financial obligations to Prime as set forth in this Agreement. Prime may set off any part of the Performance Bond against (i) cash advances made by Prime to You or for the benefit of Your drivers; (ii) all expenses specifically itemized in paragraphs 8, 9 and 10 hereof; (iii) all costs of Your insurance for coverages itemized in paragraph 11 hereof which Prime has advanced payment for; (iv) automobile liability, cargo and trailer damage claims for which You are liable to Prime as set forth in paragraph 12 hereof; (v) all amounts charged by Prime pursuant to paragraph 13 hereof; (vi) advances made to You or on Your behalf as specified in Schedule 2 hereof; (vii) all amounts charged You by Prime or paid on Your behalf by Prime as itemized on Schedule 3

hereof and accounted for in Your Weekly Settlement; (viii) advances set forth in paragraph 29; and (ix) all other obligations incurred by You which have been specified in this Agreement. If Performance Bond funds are set off, You shall provide additional money so that the Performance Bond equals Fifteen Hundred dollars ($1,500.00). In the event You fail to replenish the Performance Bond as required, You hereby authorize Prime to deduct from Your Settlement amounts necessary to replenish the Performance Bond as required. If You do not deposit the full amount of the Performance Bond, You authorize Prime to deduct from Your Settlement the amounts indicated in Schedule 3 in order to fulfill this obligation.

(b) **Interest**. Prime will pay You interest on the Performance Bond quarterly. This interest rate shall be equal to the average yield on Ninety-One (91) Day, Thirteen (13) Week Treasury Bills as established in the weekly auction by the Department of the Treasury.

(c) **Accounting**. Prime will provide You an accounting of the Performance Bond at any time requested by You. Prime shall also indicate on Your Settlement sheets the amounts and description of any deductions or additions made to the Performance Bond.

(d) Return. Upon termination of this Agreement, in order to have the Performance Bond returned to You, You must first return to Prime all of Prime's placards and other identification devices, other than those painted directly on the Equipment, Your Comdata card, all base plates, permits, licenses,

pre-pass toll transponder, properly completed logs and documents necessary to receive payments for trips made under this Agreement. You may either bring these items to Prime's terminal or deliver them to Prime via mail or other form of conveyance of Your choice. If You bring the Equipment to Prime's terminal, Prime will remove all identification devices. If not, You shall be responsible for their removal. Prime shall provide a final accounting, itemizing all deductions, and return all amounts due You from the Performance Bond within forty-five (45) days of the termination.

8. EXPENSES. You shall pay all operating and maintenance expenses in connection with the operation of the Equipment, including but not limited to fuel, fuel taxes, Federal Highway Use Taxes, tolls, ferries, detention, accessorial services, tractor repairs and Seventy-Two percent (72%) of any agent or brokerage fees charged against line haul revenues received by Prime for any freight transported by You. At your request, Prime will make advances for the payment of such expenses, and You hereby authorize Prime to deduct from Your Settlement amounts equal to the advances. Except when a violation results from Your acts or omissions, Prime shall assume the risk and costs of fines for overweight and oversized trailers when the trailers are preloaded, sealed, or the load is containerized, or when the trailer or lading is otherwise outside Your control, and for improperly permitted over-dimensions and overweight loads. Prime shall reimburse You for any fines paid by You which are Prime's responsibility. You shall be responsible for loading and unloading of trailers.

9. LICENSES, PERMITS AND AUTHORIZATIONS.

(a) **Purchase**. You are required to obtain, at Your expense, a base plate under the International Registration Plan ("IRP") permitting the Equipment to be operated in all forty-eight (48) contiguous states. Alternatively, You may authorize Prime to obtain on Your behalf, but at Your expense, all licenses, permits, IRP base plates and authorizations required for operation of the Equipment. Upon such authorization, You agree to reimburse Prime for such expenses, and You hereby authorize Prime to make the deductions from Your Settlement amounts as set forth in Schedule 3.

(b) Return. During the term of this Agreement, as well as after termination, all licenses, permits, base plates, pre-pass toll transponder and authorizations, as well as all placards, provided to You by Prime shall be the INITIAL property of Prime, and upon termination of this Agreement, You shall, within seven (7) days, return all such licenses, permits, base plates, pre-pass toll transponder, placards and authorizations to Prime. All identification devices shall be returned in the manner specified in paragraph 7(d) hereof. Any unused portion of the base plate will be credited to You if Prime receives a refund or credit from the issuing authority or upon transfer to any other vehicle in Prime's fleet.

10. DRIVERS. You shall (i) drive the Equipment Yourself, (ii) employ, on Your own behalf, drivers for the Equipment, or (iii) lease drivers for the Equipment.

(a) Contractor's Employees. If You employ, on Your own behalf, drivers for the Equipment, You shall be solely responsible for payment of their wages, benefits, Social Security taxes, withholding taxes, unemployment insurance fees, and all other amounts required by government agencies to be paid by employers on behalf of or to employees. All drivers employed by You to operate the Equipment shall be qualified so as to meet requirements of all federal, state and local laws and the rules and regulations of the Department of Transportation. All such drivers must first be certified by Prime. You shall likewise employ on Your own behalf and at Your own expense all driver's helpers and other laborers required to carry out the purpose of this Agreement. At Your request, Prime shall make payments to Your employees and for their benefit and on their behalf. You shall reimburse Prime for all such expenses and hereby authorize Prime to deduct from Your Settlement amounts required to make such reimbursements. All such reimbursements shall be equal to payments made by Prime.

(b) Leased Drivers. If You lease drivers for the Equipment, You hereby authorize Prime to make advances for all amounts required to reimburse the leasing entity with whom You contracted for services of the drivers. You shall reimburse Prime for all such expenses and hereby authorize Prime to deduct from your Settlement amounts required to make such reimbursements. All such reimbursements shall be equal to payments made by Prime. All Leased Drivers must first be certified by Prime.

11. INSURANCE

(a) **Liability**. Prime shall provide and maintain auto liability insurance for the protection of the public pursuant to FMCSA Regulations under 49 USC 13906. Said liability insurance may not necessarily insure You against loss.

(b) **Non-Trucking Use Auto Liability Coverage**. You shall provide and maintain at Your own expense non-trucking use auto liability insurance coverage. This coverage, whether referred to as "bobtail", "unladened", "deadhead" or otherwise, shall provide coverage for all risks for movement of the Equipment when it is not under dispatch by Prime. Prime shall be named as an additional insured on the policy, which shall have limits of not less than $1 million per occurrence, CSL. This policy of insurance shall be primary to and without right of contribution from all other insurance available to Prime.

(c) **Cargo Insurance**. Prime shall secure and maintain Cargo Liability Insurance.

(d) **Physical Damage Insurance**. Prime shall provide and maintain at its own expense physical damage insurance on its trailers.

(e) **Occupational Injuries**. You shall either (i) make an election to procure Workers' Compensation insurance protection against injuries sustained while in pursuit of Your business, for Yourself and' Your drivers, and thereafter provide and maintain at Your own expense such insurance; or (ii) provide and maintain at Your expense a suitable alternative insurance, such as occupational accident insurance, for Yourself and Your drivers, which insurance must be approved by Prime.

(a) Contractor's Employees. If You employ, on Your own behalf, drivers for the Equipment, You shall be solely responsible for payment of their wages, benefits, Social Security taxes, withholding taxes, unemployment insurance fees, and all other amounts required by government agencies to be paid by employers on behalf of or to employees. All drivers employed by You to operate the Equipment shall be qualified so as to meet requirements of all federal, state and local laws and the rules and regulations of the Department of Transportation. All such drivers must first be certified by Prime. You shall likewise employ on Your own behalf and at Your own expense all driver's helpers and other laborers required to carry out the purpose of this Agreement. At Your request, Prime shall make payments to Your employees and for their benefit and on their behalf. You shall reimburse Prime for all such expenses and hereby authorize Prime to deduct from Your Settlement amounts required to make such reimbursements. All such reimbursements shall be equal to payments made by Prime.

(b) Leased Drivers. If You lease drivers for the Equipment, You hereby authorize Prime to make advances for all amounts required to reimburse the leasing entity with whom You contracted for services of the drivers. You shall reimburse Prime for all such expenses and hereby authorize Prime to deduct from your Settlement amounts required to make such reimbursements. All such reimbursements shall be equal to payments made by Prime. All Leased Drivers must first be certified by Prime.

11. INSURANCE

(a) **Liability**. Prime shall provide and maintain auto liability insurance for the protection of the public pursuant to FMCSA Regulations under 49 USC 13906. Said liability insurance may not necessarily insure You against loss.

(b) **Non-Trucking Use Auto Liability Coverage**. You shall provide and maintain at Your own expense non-trucking use auto liability insurance coverage. This coverage, whether referred to as "bobtail", "unladened", "deadhead" or otherwise, shall provide coverage for all risks for movement of the Equipment when it is not under dispatch by Prime. Prime shall be named as an additional insured on the policy, which shall have limits of not less than $1 million per occurrence, CSL. This policy of insurance shall be primary to and without right of contribution from all other insurance available to Prime.

(c) **Cargo Insurance**. Prime shall secure and maintain Cargo Liability Insurance.

(d) **Physical Damage Insurance**. Prime shall provide and maintain at its own expense physical damage insurance on its trailers.

(e) **Occupational Injuries**. You shall either (i) make an election to procure Workers' Compensation insurance protection against injuries sustained while in pursuit of Your business, for Yourself and' Your drivers, and thereafter provide and maintain at Your own expense such insurance; or (ii) provide and maintain at Your expense a suitable alternative insurance, such as occupational accident insurance, for Yourself and Your drivers, which insurance must be approved by Prime.

(f) **Procuring of Insurance by Prime**. Upon Your request, an insurance broker working with Prime and knowledgeable of the requirements within this Agreement will provide You with coverage information and applications for insurance coverage required of You by this Agreement. If You elect to procure insurance through that insurance broker, You hereby authorize Prime to deduct the cost of such insurance from Your Settlement and forward those amounts to such insurance broker. The cost of all such insurance coverages shall be itemized on Schedule 3 of this Agreement. Prime, or the insurance broker, will furnish to You a certificate of insurance for each policy You purchase and a copy of each policy shall be furnished to You upon request. You shall remain financially responsible to the insurance broker and/or insurer for any insurance costs not paid due to an insufficiency of Settlement funds.

(g) **Proof of Insurance**. All insurance coverage provided by You as required by this Agreement shall be in form and substance, and issued by a company satisfactory to Prime. You shall continuously provide Prime with proof of such insurance either by current binders or certificates of insurance from the date of the execution of this Agreement until its termination.

12. ACCIDENTS, CLAIMS, LOSSES AND EXPENSES.

(a) **Auto Liability**. Prime and its auto liability insurer may settle any claim against Prime arising out of the maintenance, use or control of the Equipment. You shall pay Prime up to Five Hundred

Dollars ($500.00) per occurrence for the settlement of any such claim and related expenses.

(b) Cargo. You shall pay Prime up to Five Hundred Dollars ($500.00) per occurrence toward the settlement of cargo losses directly caused by fire, collision, overturning of vehicle, collapse of bridges or docks, rising navigable waters or river floods, perils of the seas, lakes, rivers or inland water while on ferries only, and cyclone, tornado or windstorm. If cargo losses are caused by any peril other than those itemized above, You will pay Prime that portion of such losses and expenses for which Prime does not receive payment from their insurance carrier.

(c) **Damage to Trailers**. You shall pay Prime up to Five Hundred Dollars ($500.00) per occurrence toward loss of, damage to, or liens for storage with respect to Prime's trailers which are used by You when such losses are covered by Prime's insurance. When the loss of, damage to, or liens for storage of Prime's trailers which are used by You are not covered by insurance, You shall pay for all such losses, including expenses and attorneys' fees.

(d) **Authorization to Deduct**. You hereby authorize Prime to deduct from Your Settlement all amounts due Prime under this paragraph 12. Prime shall provide You with a written explanation and itemization of any such deductions for cargo or property damage before such deductions are made.

(e) **HOLD HARMLESS AND INDEMNIFICATION**. YOU AGREE TO INDEMNIFY AND HOLD HARMLESS PRIME, ITS AFFILIATED COMPANIES AND THEIR RESPECTIVE OFFICERS, DIRECTOR, SHAREHOLDERS, EMPLOYEES,

AGENTS, SUCCESSORS AND ASSIGNS, FROM AND AGAINST ANY AND ALL LIABILITIES AND EXPENSES WHATSOEVER, INCLUDING, WITHOUT LIMITATION, CLAIMS, DAMAGES, JUDGMENTS, AWARDS, SETTLEMENTS, INVESTIGATIONS, COSTS AND ATTORNEY'S FEES (COLLECTIVELY, "CLAIMS") WHICH ANY OF THEM MAY INCUR OR BECOME OBLIGATED TO PAY ARISING OUT OF YOUR ACTS OR OMISSION OR THOSE OF YOUR AGENTS AND EMPLOYEES (INCLUDING DRIVERS LEASED FROM PRIME). YOU FURTHER AGREE TO HOLD PRIME HARMLESS AND TO INDEMNIFY PRIME AGAINST ALL CLAIMS BY YOU *AND* YOUR AGENTS AND EMPLOYEES. I UNDERSTAND THAT THIS PARAGRAPH LIMITS MY RIGHTS AND I ACKNOWLEDGE MY OPTION TO SEEK INDEPENDENT LEGAL COUNSEL AND ADVICE.

13. OPERATING STATEMENT AND PAYROLL SERVICES. At your request, Prime may provide You with an operating statement, and You hereby authorize Prime to make a deduction from Your Settlement an amount as set forth in Schedule 3. In the event Prime provides services for Your co-drivers, You hereby authorize Prime to make a deduction from Your Settlement in amount as set forth in Schedule 3.

14. CITATIONS. At Your request, Prime shall provide You with administrative services in connection with citations You receive while operating under Prime's authority, and advance money for payment of them. You agree to pay and hereby authorize Prime to deduct from Your Settlement an amount equal to the fee as set forth in Schedule 3, as well as an amount equal to the payment made on Your behalf. You are

under no obligation to submit Your citations to Prime for handling. However, You agree to report all citations to Prime.

15. FUEL CARD EXPRESS CODES/TRIP EXPRESS CHARGE. You agree that, in in the event You utilize Prime's fuel card system and express code transaction system, You will pay to Prime and hereby authorize Prime to deduct from Your Settlement an amount as set forth in Schedule 3.

16. TRACTOR PAYMENT DEDUCTION (IF APPLICABLE). You are leasing X or purchasing ___ (check one) Your tractor from SUCCESS LEASING Your payments are itemized in Schedule 2 attached hereto and made a part hereof. In addition, You are required by Your lessor or lender to place certain sums in reserve accounts as itemized in Schedule 2. By initialing Schedule 2 You authorize and request Prime to deduct those sums itemized in Schedule 2 from Your Settlement and forward them to Your lessor or lender. If the agreement with Your lessor or lender authorizes Prime to make deductions from Prime's Settlement with You for rental or purchase payments, You must provide Prime with a copy of that agreement and it shall be attached to this Agreement and made a part hereof by this reference.

17. ADDITIONAL SETTLEMENT DEDUCTIONS. From time to time, You may purchase fuel, products or services, including repairs, which are charged to Prime. When You do so, You hereby authorize Prime to deduct from Your Settlement amounts equal to such charges. You are never required to charge any amounts to Prime's account nor to make purchases from any vendor recommended by

Prime. Further, if You lease Your tractor, You may be required by Your lessor to indemnify Your lessor for claims arising out of Your acts and omissions as well as those of Your agents and employees, and to pay for portions of any loss or damage to Your tractor. When Your lease requires any such payments, You hereby authorize Prime to deduct from Your settlement amounts equal to such charges.

18. RATIFICATION OF DEDUCTIONS. In paragraphs 4, 5, 6, 7, 8, 9, 10, 11(f), 12, 14, 17 and 19 of this Agreement, Prime has agreed to make certain advances to You or on Your behalf. You have agreed to allow Prime to make deductions from Your Settlement as reimbursement for those advances. Because those advances are not capable of determination at the time of the execution of this Agreement, they shall be disclosed to You from time to time in Your Settlement. To the extent Prime is required to disclose deductions to You, that requirement regarding any such deductions shall be deemed fulfilled through Prime providing You with a Settlement. However, upon request, Prime will provide You copies of those documents which are necessary to determine the validity of the charge. Computation of each item shall be on the basis of the actual amount of each advance, charge or expense. If You have not objected to any such deduction in writing within ninety (90) days of the date of the Settlement, the deduction shall be deemed ratified by You.

19. NEGATIVE BALANCE. If You have a negative balance on Your Settlement after calculating all payments due You, less all deductions authorized herein, and if Prime has not offset that negative amount against Your security deposit, You agree to

pay to Prime interest on such negative balance at a rate equal to the average yield on Ninety-One-Day, Thirteen-Week Treasury Bills as established in the weekly auction by the Department of Treasury. Interest shall be paid on the average weekly amount of Your negative balance. If You have a substantial negative balance so that Your cash flow is affected, and if Prime agrees, You may convert some or all of that negative balance to periodic payments to Prime (the "Advance"). In that event You and Prime shall agree on the frequency of payments and You agree to pay to Prime interest on the Advance at the rate of 12% per annum. Provided, however, in the event the Prime Rate (of U. S. money center commercial banks as published in The Wall Street Journal) shall equal or exceed 10%, You agree to pay to Prime interest on the Advance at the Prime Rate plus 2%.

20. **FREIGHT BILLS AND TARIFFS**. Prime shall provide You with a copy of Prime's rated freight bill or a computer-generated document containing the same information, and, upon request, You shall have the right to examine Prime's tariffs at all reasonable times, as well as documents from which contract rates and charges are computed. Mileage is based on the latest version of the Household Goods Carrier's Bureau Mileage Guide, unless otherwise specified by Prime's customers.

21. **PRIME'S SERVICES, PRODUCTS AND EQUIPMENT**. You shall not be required to purchase or rent any products, equipment or services from Prime as a condition of entering into this Agreement. In the event that You elect to purchase or rent any products, equipment or services from or through Prime, You agree that Prime may deduct amounts due

for such products, equipment or services from the compensation due You. You and Prime agree that such amounts will include the cost of such products, equipment or services and may include amounts to cover Prime's administrative costs, either direct or indirect, of securing, offering and maintaining such products, equipment and services.

22. TERMINATION. Either party may terminate this Agreement by giving thirty (30) days' written notice of such intention to the other party. In the event either party commits a material breach of this Agreement, the other shall have the right to terminate this Agreement by giving five (5) days' written notice of such intention. Shipping requirements of Prime's customers are an essential part of Prime's business, and failure to adhere to such requirements may be deemed to be a material breach of this Agreement. The DOT has charged Prime with the duty of requiring You to observe safety standards while operating the Equipment under Prime's authority. It is agreed that Prime may terminate this Agreement immediately if it has information or knowledge or belief that the safety of the public is being endangered by You or Your agents or employees in the operation of the Equipment. In the event this Agreement is terminated by either party or upon the expiration of this Agreement, You shall, within forty-eight (48) hours, return all of Prime's property to Prime at a location specifically designated by Prime. If You shall fail to return Prime's property as provided herein, You shall be responsible for all expenses incurred by Prime in securing the proper return of said property. Such expenses may be charged back against any amounts owed You by Prime.

23. NOTICES. All notices, requests, instructions, consents and other communications to be given pursuant to this Agreement shall be in writing and shall be deemed received (i) on the same day if delivered in person, by same day courier or by telegraph, telex or facsimile transmission; (ii) on the next day if delivered by overnight mail or courier; or (iii) on the date indicated on the return receipt, or if there is no such receipt, on the third calendar day (excluding Sundays) if delivered by certified or registered mail, postage prepaid, to the party for whom intended to the following addresses:

If to Prime: Manager, Contractor Relations
P.O. Box 4208
Springfield, MO 65808

If to Contractor: HALLMARK TRUCKING LLC
1125 BARBOUR AVENUE
PORT CHARLOTTE FL 33948

Each party may, by written notice given to the other in accordance with this Agreement, change the address to which notices to such party are to be delivered.

24. RELATIONSHIP OF PARTIES. The parties intend to create by this Agreement the relationship of Carrier and Independent Contractor and not an employer/employee relationship. You are and shall be deemed for all purposes to be an Independent Contractor, not an employee of Prime. Neither You, Your employees, agents or servants, if any, are to be considered employees of Prime at any time, under any circumstance or for any purpose.

for such products, equipment or services from the compensation due You. You and Prime agree that such amounts will include the cost of such products, equipment or services and may include amounts to cover Prime's administrative costs, either direct or indirect, of securing, offering and maintaining such products, equipment and services.

22. TERMINATION. Either party may terminate this Agreement by giving thirty (30) days' written notice of such intention to the other party. In the event either party commits a material breach of this Agreement, the other shall have the right to terminate this Agreement by giving five (5) days' written notice of such intention. Shipping requirements of Prime's customers are an essential part of Prime's business, and failure to adhere to such requirements may be deemed to be a material breach of this Agreement. The DOT has charged Prime with the duty of requiring You to observe safety standards while operating the Equipment under Prime's authority. It is agreed that Prime may terminate this Agreement immediately if it has information or knowledge or belief that the safety of the public is being endangered by You or Your agents or employees in the operation of the Equipment. In the event this Agreement is terminated by either party or upon the expiration of this Agreement, You shall, within forty-eight (48) hours, return all of Prime's property to Prime at a location specifically designated by Prime. If You shall fail to return Prime's property as provided herein, You shall be responsible for all expenses incurred by Prime in securing the proper return of said property. Such expenses may be charged back against any amounts owed You by Prime.

23. NOTICES. All notices, requests, instructions, consents and other communications to be given pursuant to this Agreement shall be in writing and shall be deemed received (i) on the same day if delivered in person, by same day courier or by telegraph, telex or facsimile transmission; (ii) on the next day if delivered by overnight mail or courier; or (iii) on the date indicated on the return receipt, or if there is no such receipt, on the third calendar day (excluding Sundays) if delivered by certified or registered mail, postage prepaid, to the party for whom intended to the following addresses:

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24. **RELATIONSHIP OF PARTIES**. The parties intend to create by this Agreement the relationship of Carrier and Independent Contractor and not an employer/employee relationship. You are and shall be deemed for all purposes to be an Independent Contractor, not an employee of Prime. Neither You, Your employees, agents or servants, if any, are to be considered employees of Prime at any time, under any circumstance or for any purpose.

25. **ASSIGNMENT**. You shall not assign this Agreement or any rights or obligations hereunder to anyone without the written consent of Prime.

26. **DESIGNATION OF PAYEE**. You agree that, in the event there is more than one (1) individual named as the Contractor on the face page of this Agreement, that those persons so named will designate in writing which one of them shall be entitled to receive the weekly Settlement check due under the terms of this Agreement. Any change in such designation must be in writing and must be executed by all individuals named as Contractor herein. The purpose of this paragraph is to allow Prime to make one (1) Settlement check payable to one (1) of the individuals named as Contractor without retaining any exposure whatsoever for payment to the other named Contractor.

The following named Co-Contractor is hereby designated as the individual to receive all weekly Settlement checks in this name only:

APPROVED: _____

_____

27. **MODIFICATION OF SCHEDULES**. From time to time during the term of this Agreement amounts required to purchase insurance from a Prime affiliate or through Prime, lease or purchase payments, reserve account requirements, Qualcomm user fees and other like items may be changed from those amounts set forth on the Schedules attached hereto by the person making such charges. In such event and upon receipt in writing of notice of such modification by Prime from the person making the modification,

Prime shall notify You in writing of such change. Unless You instruct Prime in writing to the contrary within ten (10) days of the date of Prime's notice to You, the appropriate Schedule shall be deemed modified to reflect the new amount being charged and the Schedule shall be deemed by the parties as being amended accordingly.

28. SET-OFF. You hereby grant to Prime the right of immediate set off against Your weekly Settlement of all amounts due from You to Prime under the terms of this Agreement.

29. **LEASE EXPENSES ADVANCES**. If You lease Your Tractor from Success Leasing, Inc. ("Success"), Your Lease contains financial obligations in addition] to Lease Charges, Excess Mileage Charge and Tire Replacement Reserve. Those additional obligations are found in paragraphs 10, 12, 14, 15, 17 and 19(d) of Your Lease. Those obligations may be advanced by Success or Prime on Your behalf. In the event they are, You hereby authorize Prime to deduct from Your Settlement or Your Performance Bond amounts equal to such advances and remit to the entity which made the advance. The amount deducted shall be the actual cost, of each such obligation.

30. GOVERNING LAW AND ARBITRATION. THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF THE STATE OF MISSOURI. ANY DISPUTES ARISING UNDER, ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING AN ALLEGATION OF BREACH THEREOF, AND ANY DISPUTES ARISING OUT OF OR RELATING TO THE RELATIONSHIP CREATED BY THE AGREEMENT, AND ANY DISPUTES AS TO

THE RIGHTS AND OBLIGATIONS OF THE PARTIES, INCLUDING THE ARBITRABILITY OF DISPUTES BETWEEN THE PARTIES, SHALL BE FULLY RESOLVED BY ARBITRATION IN ACCORDANCE WITH MISSOURI'S ARBITRATION ACT AND/OR THE FEDERAL ARBITRATION ACT. ANY ARBITRATION BETWEEN THE PARTIES WILL BE GOVERNED BY THE COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION (THE "RULES"). THE PARTIES SPECIFICALLY AGREE THAT NO DISPUTE MAY BE JOINED WITH THE DISPUTE OF ANOTHER AND AGREE THAT CLASS ACTIONS UNDER THIS ARBITRATION PROVISION ARE PROHIBITED. IN THE EVENT OF CONFLICT BETWEEN THE RULES AND THE PROVISIONS OF THIS AGREEMENT, THE PROVISIONS OF THIS AGREEMENT SHALL CONTROL. EXCEPTIONS/CLARIFICATIONS OF THE RULES INCLUDE: (i) THE PROCEEDINGS SHALL BE CONDUCTED BY A SINGLE, NEUTRAL ARBITRATOR TO BE SELECTED BY THE PARTIES, OR, FAILING THAT, APPOINTED IN ACCORDANCE WITH THE RULES, (ii) THE SUBSTANTIVE LAW OF THE STATE OF MISSOURI SHALL APPLY, AND (iii) THE AWARD SHALL BE CONCLUSIVE AND BINDING. A DEMAND FOR ARBITRATION SHALL BE FILED NOT LATER THAN ONE (1) YEAR AFTER THE DISPUTE ARISES OR THE CLAIM ACCRUES, AND FAILURE TO FILE SAID DEMAND WITH THE ONE (1) YEAR PERIOD SHALL BE DEEMED A FULL WAIVER OF THE CLAIM. THE PLACE OF THE ARBITRATION HEREIN SHALL BE SPRINGFIELD, MISSOURI.

BOTH PARTIES AGREE TO BE FULLY AND FINALLY BOUND BY THE ARBITRATION AWARD, AND JUDGMENT MAY BE ENTERED ON THE AWARD IN ANY COURT HAVING JURISDICTION THEREOF. THE PARTIES AGREE THAT THE ARBITRATION FEES SHALL SPLIT BETWEEN THE PARTIES, UNLESS CONTRACTOR SHOWS THAT THE ARBITRATION FEES WILL IMPOSE A SUBSTANTIAL FINANCIAL HARDSHIP ON CONTRACTOR AS DETERMINED BY THE ARBITRATOR, IN WHICH EVENT PRIME WILL PAY THE ARBITRATION FEES.

31. **ENTIRE AGREEMENT**. This Agreement shall be comprised of this document executed below by You and Prime as well as all Schedules initialed by You (as amended from time to time as herein provided). Together they constitute the entire agreement between the parties hereto and may not be modified or amended except by written agreement executed by both parties or, in the case of the Schedules, as otherwise herein provided.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals on the day and year first written herein.

THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.

NEW PRIME, INC.

By: _____

"Prime"

_____

_____

"Contractor"

By Your initials on this page You acknowledge receipt of a copy of this Agreement from Prime

_____

_____

"Co-Contractor"

INDEPENDENT CONTRACTOR OPERATING AGREEMENT
SCHEDULE 1
Reefer Division

PAYMENT

Payments made to You by Prime under paragraph 3 of the Agreement shall be as follows:

1. **PERCENTAGE OF REVENUE**. Prime shall pay You 72% of the line haul revenue received by Prime for freight transported by You. The phrase "line haul revenue" means all amounts paid by Prime's customers for transportation of freight exclusive of accessorial charges. Accessorial charges are charges made by Prime to the customer for goods and services in addition to freight transportation, including but not limited to such things as loading and unloading, special permits, pallets, tarp fees and shag fees. Not all accessorial charges will be designated by the customer as separate from the "line haul revenue", but shall be itemized by Prime on the freight bill as a separate charge and for purposes of this paragraph shall not be included in the "line haul revenue". Examples are the following charges that shall be deducted from "line haul revenue" when determining payment to You: (i) all pallets that are not provided or paid for by the customer shall be charged up to $5.00 per pallet per load; (ii) all amounts paid by Prime to You or a third party for loading and unloading in excess of that paid by the customer; and (iii) all amounts paid by Prime to You or a third party for tarp and shag fees in excess of that paid by the customer. Prime may make surcharges to some customers for fuel (tractor

and/or refrigerated unit) or for liability and cargo insurance above the minimum required by law. When these surcharges are made, they shall be so designated on Prime's freight bill and itemized as a separate charge. For purposes of this paragraph, such charges shall not be included in the "line haul revenue". In addition, all amounts paid by Prime to you for fuel surcharges (tractor and/or refrigerated unit) in excess of that paid by customer will be deducted from linehaul. All fuel surcharges collected from customer in excess of amounts paid to you by Prime shall be added to linehaul.

2. REVENUE AVERAGING. Subject to the terms, conditions and limitations contained in the Agreement, You shall receive no less than $1.02 per authorized dispatched mile while operating the truck. Revenue paid to You shall be reconciled every 100,000 authorized dispatched miles. If revenue paid You at any time during the reconciliation period averages below $1.02 per mile while operating the truck Prime shall make advances to You sufficient to bring Your average revenue up to the stated minimum. Thereafter, if your revenue increases sufficiently so as to average in excess of the stated minimum, Prime will be entitled to recover from You that portion of such advances that caused Your revenue to average above the stated minimum, and You authorize Prime to deduct such amount from Your Settlement.

3. RECOVERY UPON TERMINATION. If You terminate this Agreement prior to the end of any single reconciliation period, and You have averaged less than $1.02 per authorized dispatched mile while operating the truck, but have received advances up to that

amount, You agree to repay Prime the difference between the actual average rate per mile and $1.02 per mile while operating the truck and agree that such amount may be deducted from Your security deposit.

4. **EQUIPMENT**. You agree to furnish Your own tools and equipment necessary for Your operations including, but not limited to, a pulp thermometer, two load locks, a trailer security lock approved by Prime, wrenches sufficient to adjust tractor and trailer brake assemblies, fire extinguisher, flashlight, and a minimum of three reflective/warning highway triangles.

NEW PRIME, INC.

By: _____

Date: _____ _____

"Prime"

_____

Date: _____ _____

"Contractor"

No. 17-340

IN THE

Supreme Court of the United States

NEW PRIME INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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November 20, 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Must a court compel arbitration of the question whether it has authority under the Federal Arbitration Act to compel arbitration, simply because the arbitration provision contains a delegation clause?

2. Should the Federal Arbitration Act's exemption for transportation workers' "contracts of employment," 9 U.S.C. § 1, be interpreted in accordance with the universal meaning of the term "contract of employment" at the time the statute was enacted, as the First Circuit held, or should it be construed more narrowly than its plain text allows?

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INTRODUCTION

The decision below is unremarkable: It holds that before relying on the Federal Arbitration Act to compel arbitration, a court must determine whether the Act applies. And it holds that the words of the Federal Arbitration Act must be interpreted according to their common meaning at the time the statute was passed. Prime's contention that these unexceptional conclusions warrant review is meritless.

First, Prime argues that this Court's precedent conflicts with the First Circuit's holding that a court must determine whether the Federal Arbitration Act applies before relying on the Act to compel arbitration. Not so. Contrary to Prime's contention, this Court has never held that the Federal Arbitration Act requires courts to compel arbitration of the question whether they have authority under the Act to compel arbitration. Nothing in this Court's case law even suggests that absurd proposition.

Nor is there a circuit split worthy of review on this issue. The only other Circuit to have analyzed the issue in anything more than a cursory fashion came to the same conclusion as the First Circuit.

Second, Prime takes issue with the First Circuit's holding that the Federal Arbitration Act's exemption for transportation workers' "contracts of employment" applies to all transportation workers' agreements to perform work. But the First Circuit merely applied the exemption in accordance with the common meaning of its terms at the time the Federal Arbitration Act was passed. This Court has repeatedly held that the words of a statute must be given their ordinary meaning at the time the statute was enacted. The lower court simply followed this Court's instruction.

And contrary to Prime's contention, the First Circuit's interpretation does not conflict with that of any other Circuit. It couldn't—the First Circuit is the first federal Court of Appeals to consider this issue.

Finally, Prime's dramatic claim that the decision below will somehow make it impossible to arbitrate throughout the entire transportation industry is demonstrably false. As the First Circuit explained in its opinion, its holding is extremely limited: It applies only to the contracts of employment of transportation workers and only to the Federal Arbitration Act. It has no impact on non-employment contracts within the transportation industry and no impact on state laws governing arbitration. The decision doesn't render arbitration agreements in the transportation industry unenforceable. It merely means that a small subset of those agreements must be enforced under state, rather than federal, law.

In fact, while Prime argues to this Court that the decision below will have a sweeping impact that must be reviewed, it is simultaneously arguing to the district court on remand that the First Circuit's decision has *no* impact because, Prime contends, even if the company cannot compel arbitration under federal law, it can do so under Missouri law.

Prime seeks review of a decision that is fully in accordance with this Court's precedent, does not conflict with any other Circuit that has taken more than a cursory look at the issues, and by its own terms, has limited impact. Prime's petition should be denied.

STATEMENT OF THE CASE

1. New Prime, Inc. is a national trucking company that recruits drivers by advertising a "Paid Apprenticeship," in which new drivers haul goods for Prime

alongside an experienced Prime driver for 10,000 miles. Prime App. 183-84. Prime guarantees that drivers who work for the company as "apprentices" will earn a minimum of $600 per week. Prime App. 36.[1]

In March 2013, Dominic Oliveira began working for Prime as an "apprentice." Prime App. 183-84. But Prime did not pay him the income the company promised. In fact, Prime did not pay him anything at all. Prime App. 184. It turns out Prime actually *charges* drivers to apprentice at the company. Prime App. 13, 41.

After driving 10,000 miles for Prime, Prime upgraded Mr. Oliveira's status from "apprentice" to "driver trainee," and began paying Mr. Oliveira for his work. Prime App. 184. But they paid him well below minimum wage. During his time as a "trainee," Mr. Oliveira drove thousands of miles per week for the company, for which he earned approximately $440-$480 weekly—or about $4 per hour. *Id.*

After driving 30,000 miles for Prime as a "driver trainee," Mr. Oliveira became a regular Prime driver. Prime App. 184. As a condition of his continued employment, the company required Mr. Oliveira to sign an Operating Agreement. Prime App. 185. Although Mr. Oliveira did exactly the same work as drivers the company labeled employees, the Operating Agreement labeled Mr. Oliveira an "independent contractor." Prime App. 18, 185-86.[2]

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[1] This brief refers to the appendix Prime filed before the Court of Appeals as Prime App.

[2] Mr. Oliveira was actually required to sign two Operating Agreements, one when he first became a regular driver for Prime, and an identical one the following year to continue his employ-

Again, Prime did not consistently pay Mr. Oliveira minimum wage. Prime made regular deductions from Mr. Oliveira's paycheck—for "lease payments" on the truck he drove, for the tools Prime required him to buy, and for the fuel required to haul freight. Prime App. 186-87. Because of these deductions, on several occasions, Mr. Oliveira's paycheck was actually negative, despite having spent dozens of hours on the road driving for Prime. Prime App. 187. That is, Prime sometimes *charged Mr. Oliveira* for working for the company.

2. On March 4, 2015, Mr. Oliveira filed a lawsuit, alleging that Prime violated state and federal law by failing to pay him—and other similarly situated Prime drivers—minimum wage. Prime App. 2, 26-29. Prime moved to compel arbitration, based on an arbitration clause contained in the Operating Agreement it required Mr. Oliveira to sign. Prime App. 73. The company relied solely on the Federal Arbitration Act, expressly disclaiming any reliance on state law or any other source of authority. *See* Prime App. 157.

The district court denied the motion to compel. Prime App. 201. And the First Circuit affirmed. Pet. App. 2a-3a.

First, the Court of Appeals rejected Prime's argument that an arbitrator—and not the court—should decide whether the Federal Arbitration Act applies to Prime's Operating Agreement. Pet. App. 16a. Prime moved to compel arbitration under the Federal Arbitration Act. If the statute did not apply, the First Circuit explained, the court could not rely on it for authority to compel arbitration. Pet. App. 15a.

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ment. Pet. App. 5a. Because these agreements are identical, this brief refers to them together as the "Operating Agreement."

Therefore, the court concluded that whether the statute applies was a question the court itself must answer before it could decide whether to compel arbitration. Pet. App. 16a.

Second, the First Circuit held that Prime's Operating Agreement is a transportation worker's "contract of employment," exempt from the Federal Arbitration Act. Pet. App. 35a; *see also* 9 U.S.C. § 1 (providing that "nothing herein contained," i.e. nothing in the Federal Arbitration Act, "shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"). As the court noted, there is no dispute that Mr. Oliveira—a long-haul truck driver—is a transportation worker. Pet. App. 8a n.9. The only dispute on this issue, therefore, was whether the Operating Agreement—a contract for Mr. Oliveira to work for Prime—constituted a "contract of employment" within the meaning of the Federal Arbitration Act.

Following this Court's instruction that courts should give statutory terms their ordinary meaning at the time the statute was enacted, the First Circuit determined which contracts are "contracts of employment" for purposes of the Federal Arbitration Act by examining the ordinary meaning of the term "contract of employment" at the time the statute was passed. Pet. App. 25a-28a. The court found that, universally, the term meant an agreement to perform work—regardless of the employment status of the worker. *Id.* Independent contractors' agreements to perform work, just like the agreements of other workers, were uniformly called "contracts of employment." *See id.* In accordance with this ordinary meaning, the First Circuit held that by exempting the "contracts of

employment" of transportation workers, the Federal Arbitration Agreement exempted all transportation workers' agreements to perform work, including those of independent contractors. Pet. App. 30a.

The First Circuit explained that Congress's decision not to distinguish between independent contractors and other workers in the Federal Arbitration Act made sense given that—as this Court has itself explained—Congress exempted transportation workers from the Act because of its "'demonstrated concern with transportation workers and their necessary role in the free flow of goods.'" Pet. App. 29a (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 (2001)). Transportation workers have the same "role in the free flow of goods," regardless of their "precise employment status." Pet. App. 29a-30a. Therefore, the court concluded, it was logical that the Federal Arbitration Act would not distinguish between independent contractors and other transportation workers. *See* Pet. App. 29a-30a.

Based on the plain meaning of the statute's transportation worker exemption—and its purpose—the First Circuit held that "a transportation-worker agreement that establishes or purports to establish an independent-contractor relationship is a contract of employment under" the Federal Arbitration Act. Pet. App. 34a. The court "emphasize[d]" the "limited" nature of this holding: "It applies only when arbitration is sought under the [Federal Arbitration Act], and it has no impact on other avenues (such as state law) by which a party may compel arbitration." Pet. App. 34a.

Although Judge Barbadoro wrote separately, he agreed that a court must decide whether the Federal Arbitration Act applies before relying on the statute to compel arbitration. Pet. App. 35a. He also stated that

he did not dissent "to take issue with the court's reasoning" in interpreting the transportation worker exemption, which he called "impressive." Pet. App. 40a. Rather, Judge Barbadoro wrote separately only because he believed that the First Circuit should have waited to determine whether the transportation worker exemption applies to independent contractors until after the district court had determined whether Mr. Oliveira was, in fact, an independent contractor. Pet. App. 35a-36a.

Prime petitioned for rehearing and rehearing en banc. Pet. App. 42a. The First Circuit denied the petition. *Id.*

REASONS FOR DENYING THE WRIT

I. REVIEW OF THE FIRST CIRCUIT'S CONCLUSION THAT THE TRANSPORTATION WORKER EXEMPTION SHOULD BE INTERPRETED IN ACCORDANCE WITH ITS PLAIN MEANING IS UNWARRANTED.

Contrary to Prime's contention, the First Circuit's conclusion that the term "contract of employment" for purposes of the Federal Arbitration Act encompasses all agreements to perform work—including those of independent contractors—does not conflict with either this Court's precedent or the precedent of any other Circuit. To the contrary, the First Circuit's interpretation is not only consistent with this Court's precedent, it is *required* by it—for it is the only interpretation of the Act that accords with the ordinary meaning of the term "contract of employment" at the time the statute was passed. Moreover, this interpretation cannot possibly conflict with the decision of any other

Circuit, as Prime claims, because the First Circuit is the first federal Court of Appeals to address the issue.

A. The First Circuit's Interpretation of the Transportation Worker Exemption is Consistent with this Court's Precedent.

This Court's case law establishes that the "controlling principle" of statutory interpretation "is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017).[3] Statutory interpretation, therefore, must "begin and end" by "giving each word its ordinary" meaning at the time the statute was passed. *Id.*; *see Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2165 n.2 (2015).

The First Circuit dutifully followed this Court's instruction. The Federal Arbitration Act provides that "nothing herein contained shall apply to" transportation workers' "contracts of employment." 9 U.S.C. § 1; *see Circuit City*, 532 U.S. at 109. The statute does not define the term "contract of employment." So, to determine which agreements are "contracts of employment" for purposes of the Act, the lower court carefully examined the common meaning of the term in 1925, when the statute was enacted. Pet. App. 25a-29a.

After a rigorous examination of contemporary sources, the court found that at the time the Act was passed, the common—and, in fact, *the only*—meaning of the term "contract of employment" was an agreement to perform work, regardless of the status of the worker. *See* Pet. App. 25a-29a. The historical record is

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[3] Unless otherwise specified, all internal quotation marks, citations, and alterations omitted.

absolutely clear that the term was used to describe the agreements of all workers, including independent contractors. *See id.* Countless sources, contemporary with the passage of the Act, describe an independent contractor's agreement to perform work as a "contract of employment." *See id.* And neither Mr. Oliveira nor the First Circuit found—nor has Prime identified—a single contemporary source that used the term to exclude independent contractors.

Moreover, contrary to Prime's contention, it makes perfect sense that Congress would incorporate into the Federal Arbitration Act the common meaning of the term "contract of employment" as simply an agreement to perform work. As this Court explained, the Federal Arbitration Act exempts transportation workers because of Congress's "demonstrated concern with transportation workers and their necessary role in the free flow of goods." *Circuit City*, 532 U.S. at 121. Because of transportation workers' importance to the economy, Congress wanted to ensure that it retained the power to regulate dispute resolution between transportation companies and their workers. It could not do so if transportation companies were empowered under the Federal Arbitration Act to design their own dispute resolution.

Given this purpose, it would make no sense for Congress to distinguish between independent contractors and other workers. As the First Circuit explained, transportation workers' role in the free flow of goods is no different if they are labeled "employees" than if they are labeled "independent contractors." Pet. App. 29a-30a. A strike by the nation's truck drivers, for example, would be equally damaging to interstate

commerce, regardless of whether the drivers were independent contractors or not.[4]

Nevertheless, Prime asserts that an independent contractor's agreement to perform work cannot possibly be a "contract of employment" within the meaning of the Federal Arbitration Act. Why? Essentially, because Prime says so. Prime does not dispute—or even address—the mountain of evidence demonstrating that, when the Federal Arbitration Act was passed, the term "contract of employment" was uniformly used to refer to independent contractors' agreements to perform work, as well as those of other workers. The company does not cite a *single* example, contemporary with the passage of the Act, of *any* use

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[4] Furthermore, and also contrary to Prime's assertion, there *were* other dispute resolution statutes at the time the Federal Arbitration Act was passed that *did* apply to independent contractors. *See, e.g.*, Shipping Commissioners Act of 1872, § 25, 17 Stat. 262 (authorizing government-appointed shipping commissioners to resolve disputes between a "master, consignee, agent, or owner" of a ship "and *any* of his crew" (emphasis added)); *Railway Employees' Dep't, A.F.L. v. Indiana Harbor Belt Railroad Co.*, Decision No. 982, 3 Dec. U.S. R.R. Lab. Bd. 332, 337 (1922) (explaining that in passing the Transportation Act of 1920, which governed the dispute resolution of railroad workers, Congress "undoubtedly" meant for it to apply to all "those engaged in the customary work directly contributory to the operation of the railroads"—including independent contractors); *see also* Erdman Act, 30 Stat. 424 (1898) (earlier dispute resolution statute that explicitly stated that it applied to railroad workers even if "the cars" in which they worked were "held and operated by the carrier under lease or other contract"—that is, even if they were independent contractors); Newlands Act, 38 Stat. 103 (same). If the Federal Arbitration Act applied to independent contractors, it would have conflicted with these statutes.

of the term "contract of employment" to exclude independent contractors.[5]

The only sources Prime cites for its assertion that the term "contract of employment" excludes the employment contracts of independent contractors are a Supreme Court case from *1992*—which does not address the term "contract of employment" at all—and

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[5] The first instance of the more narrow usage Prime advocates appears to be a 1954 New Mexico case—nearly thirty years after the passage of the Federal Arbitration Act. *See Nelson v. Eidal Trailer Co.*, 58 N.M. 314, 316 (1954). And even today, this narrower usage is still in the minority. The term "contract of employment" continues to be commonly used to encompass all agreements to perform work, including those of independent contractors. *See, e.g.*, Va. Code Ann. § 59.1–501.3(d)(5) (2017) ("This chapter does not apply to a contract of employment of an individual, other than an individual hired as an independent contractor . . . ."); Md. Code Ann., Com. Law § 22-103 (similar); *Gray v. FedEx Ground Package Sys., Inc.*, 799 F.3d 995, 1000 (8th Cir. 2015) (explaining that label used in "employment contract" is one of eight factors used to determine whether a worker is an independent contractor); *Fernandez v. Transp. Designs, Inc.*, No. SA-16-CA-022-OLG, 2017 WL 1294556, at *2 (W.D. Tex. Feb. 28, 2017) (using the term "employment contract" to refer to an agreement of either an employee or an independent contractor); *Ybarra v. Texas Migrant Council*, No. 5:15-CV-136, 2016 WL 5363732, at *4 (S.D. Tex. Aug. 11, 2016) (same); *King v. Bd. of Cty. Commissioners, Polk Cty., Florida*, No. 8:16-CV-2651-T-33TBM, 2017 WL 1093647, at *10 (M.D. Fla. Mar. 23, 2017) (referring to independent contractor's agreement as an "employment contract"); *Salim v. Sec'y of Health & Human Servs.*, No. 15-1255V, 2016 WL 4483049, at *1 (Fed. Cl. June 23, 2016) (same); *QinetiQ U.S. Holdings, Inc. & Subsidiaries v. C.I.R.*, 110 T.C.M. (CCH) 17 (T.C. 2015) (same); 41 Am. Jur. 2d Independent Contractors § 7 (using the term "employment contract" to refer to an agreement of either an employee or an independent contractor); 2 Federal Tax Guide to Legal Forms § 7:35 (2d ed.) (using the term "contract of employment" to refer to an agreement of either an employee or an independent contractor).

a dictionary entry from *2014*—which Prime mischaracterizes. The 1992 case defines the term "*employee*" for purposes of ERISA, a statute passed nearly fifty years after the Federal Arbitration Act. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 319 (1992) (emphasis added). It says nothing about the term "contract of *employment*"—let alone about the meaning of that term in 1925, when the Federal Arbitration Act was passed.

In 1925, although the term "*employee*" was sometimes—but by no means always—used as a term of art to denote a particular subset of workers (a subset that changed based on the purpose of the classification), other forms of the word employ were never used that way.[6] The terms "employ," "employer," "employment," and "contract of employment" *always* referred to all workers—including independent contractors.[7] In

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[6] In 1925, as now, where there was no reason to distinguish between different types of workers, the term employee was often used to mean *all* workers—including independent contractors. *See, e.g.*, *Indiana Harbor Belt Railroad*, 3 Dec. U.S. R.R. Lab. Bd. at 337 (explaining that in the Transportation Act of 1920, when Congress referred to "railroad employees[,] it undoubtedly contemplate[d] those engaged in the customary work directly contributory to the operation of the railroads"—including independent contractors); 49 C.F.R. § 390.5 (defining the term "employee" for purposes of the Motor Carrier Act to include any "driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle)").

[7] *See, e.g.*, *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 30 (1922) ("[T]he Court of Common Pleas held that the party employed was an independent contractor."); *Arthur v. Texas & P. Ry. Co.*, 204 U.S. 505, 516-17 (1907) (referring to "an independent contractor" as "employed . . . to do work upon the freight"); *Woodward Iron Co. v. Limbaugh*, 276 F. 1, 2 (5th Cir. 1921) ("[T]he moving of the coal by tramcars was not included in the work which Waters was

fact, the term independent contractor was—and still is—frequently *defined* as a worker "exercising an independent *employment*."[8]

Contrary to Prime's contention, the 2014 edition of Black's Law Dictionary does not suggest otherwise. That dictionary—published almost a century after the Federal Arbitration Act was passed—lists the term "contract of employment" as synonymous with the term "employment contract." Contract, *Black's Law Dictionary* (10th ed. 2014). The entry for "employment contract" states that the term was first used in 1927. *Id.* But it does not give the 1927 definition. *See id.* It gives the *2014* definition, which it lists as "a contract between an employer and employee." *See id.* Prime structures its argument on this point to misleadingly

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employed to do as an independent contractor."); *John L. Roper Lumber Co. v. Hewitt*, 287 F. 120, 121 (4th Cir. 1923) (listing circumstances under which "the employer is not answerable to a third person for injuries resulting from the negligence of the contractor"); *Pierson v. Chicago, R.I. & P. Ry. Co.*, 170 F. 271, 274 (8th Cir. 1909) ("An independent contractor is one who renders service in the course of an occupation representing the will of his employer only as to the result of his work and not as to the means by which it is accomplished."); Pet. App. 25a-29a; *infra* n.8.

[8] *See, e.g.*, *Prest-O-Lite Co. v. Skeel*, 182 Ind. 593 (1914) (emphasis added); *Alexander v. R. A. Sherman's Sons Co.*, 86 Conn. 292, 297 (1912); *Harmon v. Ferguson Contracting Co.*, 159 N.C. 22 (1912); *Karl v. Juniata Cty.*, 206 Pa. 633 (1903); *General Discussion of the Nature of the Relationship of Employer and Independent Contractor*, 19 A.L.R. 226, 227-232, 243 (1922) (citing numerous cases); *accord Nationwide Mut. Ins. Co. v. Smith*, No. 11-1266-JAR-GLR, 2017 WL 4338345, at *4 (D. Kan. Sept. 29, 2017); *Sellers v. Tech Serv., Inc.*, 421 S.C. 30 n.6 (Ct. App. 2017); *Timster's World Found. v. Div. of Employment Sec.*, 495 S.W.3d 211, 219 (Mo. Ct. App. 2016); *Standard Oil of Connecticut, Inc. v. Adm'r, Unemployment Comp. Act*, 320 Conn. 611, 623 (2016).

suggest that when the term "employment contract" was used in 1927, it bore this 2014 definition. *See* Pet. 16. But the dictionary does not say that. And there is no evidence to support that contention. (Nor is it clear how the definition of a term Prime contends did not exist until 1927 could help elucidate the meaning of a statute passed in 1925.)[9]

All historical evidence—including the edition of Black's Law Dictionary that was operative at the time—demonstrates that, when the Federal Arbitration Act was passed, the terms "employment," "employment contract," and, most importantly, "contract of employment" applied to *all* workers, including independent contractors. *See, e.g.*, *supra* page 7-8 & nn.7-8; *Black's Law Dictionary* 616 (2d ed. 1910) (lacking definition of "employment contract," but defining "independent contractor" as a worker "exercising an independent *employment*" (emphasis added)).

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[9] *Black's Law Dictionary* is actually wrong about when the term "employment contract" was first used. The term was used well before 1927. *See, e.g.*, *Blair v. Kingman Implement Co.*, 87 Neb. 736 (1910) (quoting contract entitled "employment contract"). But it seems to have been relatively rare at the time—a Westlaw search for "employment contract" between 1900 and 1930 turns up far fewer mentions than a search for "contract of employment." But when it was used, the term "employment contract," like the term "contract of employment," was used to mean simply an agreement to perform work—it applied to the agreements of independent contractors and other workers alike. *See, e.g.*, *Kelly v. Hanson*, 109 Okla. 248 (1925) (describing as an "employment contract" the agreement of an independent contractor to provide "for $15 per day . . . an engine and a man"); The Compensation Rev., Vol. XI at 384 (Mar. 1930) (using term "employment contract" to describe agreements of all workers, including independent contractors).

This Court's clear mandate is that statutes are to be interpreted according to their ordinary meaning *at the time* the statute was passed. It's not the First Circuit's decision that conflicts with this Court's precedent. It's Prime's reliance on anachronistic sources that don't even say what Prime says they do.

This analysis is no different simply because it involves the Federal Arbitration Act. Although this Court has given the statute's exemption for transportation workers "a narrow construction," it has never held that the exemption may be construed *more* narrowly than its plain text allows. *See Circuit City*, 532 U.S. at 118. This Court holds that courts interpreting the exemption should not go "*beyond* the meaning of the words Congress used"—not that they should ignore that meaning entirely. *Id.* at 119 (emphasis added).

Undisputed evidence demonstrates that the ordinary meaning of the phrase "contract of employment" at the time the Federal Arbitration Act was passed included the contracts of independent contractors. Under this Court's case law, that ordinary meaning must be enforced. That is precisely what the First Circuit did.

B. There is No Circuit Split on the Meaning of the Term "Contract of Employment" as Used in the Federal Arbitration Act.

The First Circuit is the first federal Court of Appeals to rule on whether the transportation worker exemption applies to all transportation workers, as its plain text dictates, or whether it should be interpreted contrary to the ordinary meaning of its terms to exclude independent contractors. Because there are no

other federal appellate decisions on this issue, there is not—and could not be—a circuit split. Prime's contention to the contrary is meritless.

Prime attempts to manufacture a split by mischaracterizing the Ninth Circuit's decision in *Van Dusen*. *See* Pet. 9 (citing *In re Swift Transportation Co. Inc.*, 830 F.3d 913 (9th Cir. 2016) ("*Van Dusen III*")). In that case, a trucking company petitioned the Court of Appeals for a writ of mandamus, after the district court issued a scheduling order providing for discovery on whether the contract at issue was a transportation worker's contract of employment exempt from the Federal Arbitration Act. *Id.* at 915. The Ninth Circuit denied the writ. *Id.*

The court explained that the company had not met the high standard required to demonstrate that the "drastic and extraordinary remedy" of mandamus was warranted. *Van Dusen III*, 830 F.3d at 915-17. The court gave several reasons, including: The district court had only issued a scheduling order—it had not yet ruled on whether the exemption applied—and when it ruled on the issue, it could very well correctly interpret the law; if the district court did eventually misinterpret the law, the company could appeal, meaning that it had an adequate remedy besides mandamus; and, at the time, the meaning of the transportation worker exemption was a question of first impression in every circuit, which meant that any district court ruling on the issue could not possibly satisfy the "clear error" standard required to grant mandamus. *See id.* at 916-17. None of these reasons had anything to do with the interpretation of the exemption—the district court hadn't even interpreted the statute yet.

Contrary to Prime's assertion, not a single judge on the panel stated that the "applicability of the Section 1 exemption turns on whether the plaintiff" is an independent contractor, Pet. 9. The majority opinion merely held that mandamus was unwarranted—it expressed no view on how the exemption should be interpreted. *Van Dusen III*, 830 F.3d at 915-17. Judge Ikuta, in dissent, argued that the court should have granted mandamus and ordered the district to define the term "contract of employment for purposes of the" Federal Arbitration Act "using standard tools of statutory construction." *Id.* at 920 (Ikuta, J., dissenting). And Judge Hurwitz, concurring, suggested that he agreed that Judge Ikuta's approach was the proper method for determining whether a contract is a "contract of employment" within the meaning of the statute. *Id.* at 918 (Hurwitz, J., concurring). But he believed that mandamus was nevertheless unwarranted because the district court hadn't even ruled on the company's motion to compel arbitration yet. *See id.* Neither Judge Ikuta nor Judge Hurwitz actually conducted the statutory interpretation they proposed, let alone stated that they believed that the result of that interpretation would demonstrate that the statute distinguished between workers based on employment status.[10]

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[10] To be fair, Judge Ikuta's opinion seems to imply that she suspected that upon conducting the proper statutory analysis, the district court would find that the exemption did not cover independent contractors. But she did not actually conduct this analysis. So, contrary to Prime's assertion, she did not—and could not—opine on the outcome. And, it turns out, if the district court had undertaken the analysis Judge Ikuta advocated, her suspicions would not have been borne out: The historical evidence uniformly demonstrates that the common meaning of the term

Thus, contrary to Prime's contention, the Ninth Circuit has not ruled on this issue at all. The Ninth Circuit has merely held that a district court's scheduling order for deciding the issue was not so clearly erroneous and prejudicial as to require the "drastic remedy" of mandamus. And the only two judges of the Ninth Circuit to have expressed any opinion on the issue have suggested that, in their view, the issue is one of statutory interpretation. That is, they *agree* with the First Circuit. There is no circuit split here. This Court should not allow Prime to manufacture one by mischaracterizing the case law.

Prime also mischaracterizes the lower court decisions on this issue. Prime states that courts "have uniformly understood the phrase 'contracts of employment'" in the Federal Arbitration Act to exclude independent contractors. Pet. 8-9. That's false. Lower courts are split on the issue. *See, e.g.*, *Owner-Operator Indep. Drivers Ass'n v. C.R. England, Inc.*, 325 F. Supp. 2d 1252, 1257 (D. Utah 2004) (noting split of authority); *Pacific 9 Transp., Inc. v. Labor Comm'r*, No. BC 544496 (Cal. Sup. Ct. July 8, 2014) ("Although there is a split of authority on this issue, the Court finds [the truck drivers'] briefing and cited authorities more persuasive.").

And although many district courts have *assumed* that the exemption does not apply to independent contractors, none of these courts actually analyzed the text of the statute, as required by this Court's case law. *See* Pet. App. 23a. The California Court of Appeal decision Prime cites suffers the same flaw. *See*

"contract of employment" at the time included the contracts of independent contractors.

Performance Team Freight Sys., Inc. v. Aleman, 241 Cal. App. 4th 1233, 1241-42 (2015).

No court that has actually examined the common meaning of the term "contract of employment" in 1925 has held that the exemption does not apply to independent contractors.

This issue is currently pending before the Ninth and Eleventh Circuits. *See Van Dusen v. Swift Transp. Co., Inc.*, No. 17-15102 (9th Cir.); *Gates v. TF Final Mile, LLC*, No. 16-17717 (11th Cir.). There is every reason to believe that these courts will adopt the First Circuit's approach—after all, it's the only approach that accords with the common meaning of the statute. But if they diverge, this Court can reconsider whether to take up the issue then. There is no reason to do so now.

II. REVIEW OF THE FIRST CIRCUIT'S CONCLUSION THAT COURTS MUST DETERMINE WHETHER THE FEDERAL ARBITRATION ACT APPLIES BEFORE RELYING ON IT TO COMPEL ARBITRATION IS UNWARRANTED.

There is no reason for this Court to review the First Circuit's commonsense conclusion that before relying on the Federal Arbitration Act to compel arbitration, a court must determine whether the Federal Arbitration Act applies. This conclusion accords with Supreme Court precedent and with the only other appellate decision to fully analyze the issue.

A. The First Circuit's Conclusion Accords with Supreme Court Precedent.

It is beyond dispute that courts may not rely on a statute for authority to act if the statute does not

apply. *See, e.g.*, *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 739 (2014); *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91 (2002); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 201-02 (1956). This obvious truism is no different in the arbitration context: In *Bernhardt*, this Court held that courts may not rely on the Federal Arbitration Act to enforce an arbitration clause that the statute excludes from its reach. *See Bernhardt*, 350 U.S. at 201-02. The First Circuit's conclusion that before relying on the Act to compel arbitration, courts must determine whether the Act applies, is dictated by this case law.

The Federal Arbitration Act emphatically excludes the contracts of employment of transportation workers. 9 U.S.C. § 1 ("*[N]othing*" in the Act "*shall apply* to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." (emphasis added)). If a court were to rely on the Act to compel arbitration pursuant to an arbitration clause in a transportation worker's contract of employment, the court would be violating the law.

It would seem inarguable, then, that before relying on the Federal Arbitration Act to compel arbitration, a court must determine whether the arbitration clause at issue is contained in a transportation worker's "contract of employment." Prime does not dispute this general principle.

Instead, the company contends that there is an exception for contracts containing a delegation clause—that is, contracts where the arbitration provision not only provides for the arbitration of substantive disputes, but also delegates to the arbitrator the resolution of disputes about "arbitrability." Pet. 7.

Prime argues that—so long as a company includes a delegation clause in its contract—courts are required, under the Federal Arbitration Act, to compel arbitration of the question whether they have authority under the Federal Arbitration Act to compel arbitration. This argument is absurd. As the First Circuit explained, it "puts the cart before the horse and makes no sense." Pet. App. 14a. Contrary to Prime's contention, nothing in this Court's case law supports it.

As Prime acknowledges, this Court's precedent holds that a delegation clause is simply a species of arbitration clause. *See* Pet. 11-12 (citing *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010)). Compelling arbitration pursuant to a delegation clause is still compelling arbitration. And the Federal Arbitration Act cannot be used to compel arbitration pursuant to *any* arbitration clause contained within the contract of employment of a transportation worker—including a delegation clause. *See* 9 U.S.C. § 1. Therefore, to determine whether it has authority under the Federal Arbitration Act to enforce a delegation clause, a court must first determine whether the clause is contained in a transportation worker's "contract of employment"—just as it would with any other kind of arbitration clause.

Prime contends that the parties here "express[ly]" agreed that an arbitrator would determine whether the Federal Arbitration Act applies. Pet. 13. But this contention is both false and irrelevant.

1. Nothing in the company's contract says anything about who should decide the applicability of the Federal Arbitration Act. Prime's suggestion to the contrary is simply false. *Cf.* Pet. 13. So too is Prime's contention that because the contract delegates questions of "arbitrability" to the arbitrator, "the parties

agreed to arbitrate *every* gateway issue in a potential dispute." Pet. 7.

To the contrary, this Court has made clear that *not* every gateway issue is a question of "arbitrability" that may be delegated to an arbitrator. *See, e.g.*, *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297, 299 (2010) (formation issues always for the court to decide); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002).

And with good reason. If every gateway issue were a question of "arbitrability" that could be delegated, a federal court whose subject matter jurisdiction was contested could be required to compel arbitration of the question whether it had jurisdiction to compel arbitration. *Cf. Vaden v. Discover Bank*, 556 U.S. 49, 62-63 (2009) (explaining that a federal court cannot compel arbitration unless it has subject matter jurisdiction over the underlying controversy). Courts could be forced to compel arbitration of a dispute about whether a validly formed agreement to arbitrate even exists. *Cf. Granite Rock*, 561 U.S. at 299; *Rent-A-Center*, 561 U.S. at 71 ("If a party challenges the validity . . . of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement."). And, as Prime advocates here, courts could be required to compel arbitration of the question whether they have authority to compel arbitration. *Cf. E.E.O.C. v. Waffle House*, 534 U.S. 279, 289 (2002) (refusing to compel arbitration because plaintiff was not a signatory to arbitration contract, and "nothing in the [Federal Arbitration Act] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement"). That is not the law.

To the contrary, arbitrability, as defined by this Court, is a far more limited concept than what Prime suggests. This Court defines "arbitrability" not as every possible gateway issue, but as the limited issue of "whether the parties have submitted a particular dispute to arbitration." *Howsam*, 537 U.S. at 83; *see AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986).[11]

Here, the question is not whether the parties agreed to submit a particular dispute to arbitration. It's whether Prime's contract with its drivers is a "contract of employment" exempt from the Federal Arbitration Act—and therefore whether the court has authority under the statute to enforce any agreement the parties might have entered. As the First Circuit properly held, this is an entirely "distinct inquiry" that has nothing to do with arbitrability. Pet. App. 13a. This Court has never held otherwise.[12]

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[11] In arguing otherwise, Prime cites this Court's decision in *AT&T*. Pet. 7. But *AT&T* defines "the question of arbitrability" narrowly, just like this Court's other case law, stating that "arbitrability" is whether a contract "creates a duty for the parties to arbitrate the particular grievance" at issue. *AT&T Techs.*, 475 U.S. at 649.

[12] Prime also argues that the mere fact that its arbitration clause states that arbitration will be conducted pursuant to the rules of the American Arbitration Association is somehow "clear and unmistakable" evidence that the parties delegated every gateway issue to the arbitrator. Pet. 7. It is not. For one thing, a bare reference to an arbitration provider's rules cannot possibly meet the "heightened standard" required to demonstrate that a party clearly and unmistakably agreed to delegate to an arbitrator an issue ordinarily reserved for the court. *See Rent-A-Center*, 561 U.S. at 69 n.1.

Moreover, the American Arbitration Association rules *do not* delegate every gateway issue to the arbitrator. They state that

To the contrary, this Court has repeatedly decided for itself disputes about whether a court has authority to compel arbitration, even in cases where the arbitration contract at issue delegated disputes about arbitrability to the arbitrator. *See, e.g.*, *Waffle House*, 534 U.S. at 289 (holding Federal Arbitration Act did not authorize arbitration under circumstances of the case); *id.* at 282 n.1 (reprinting arbitration provision, including delegation clause); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 673 (2012) (deciding whether Credit Repair Organizations Act precluded enforcement under the Federal Arbitration Act of an arbitration agreement between the parties in the case); Br. for Petitioners, *CompuCredit Corp. v. Greenwood*, 2011 WL 2533009, at *7-*8 (quoting arbitration provision, including delegation clause).

2. Moreover, even if Prime's contract did purport to delegate to an arbitrator questions about the court's authority to compel arbitration, if the contract is a "contract of employment," courts still could not rely on the Federal Arbitration Act to enforce that delegation. As this Court has made clear, where the Federal Arbitration Act explicitly limits courts' authority, parties may not override that limitation by agreeing

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"[t]he arbitrator shall have the power to rule on his or her own jurisdiction." American Arbitration Association, Comm. Arbitration Rules & Mediation Procedures, R-7. Not all gateway questions are questions of an arbitrator's jurisdiction—the gateway question here, for example, is a question of the *court's* authority.

This Court has never held that a bare reference to an arbitration provider's rules is clear and unmistakable evidence of delegation. And it certainly hasn't held that it can be clear and unmistakable evidence that the parties intended to compel arbitration of the question whether the court has authority to compel arbitration.

otherwise. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586-89 (2008).

The Federal Arbitration Act explicitly provides that courts may not rely on the Act to compel arbitration pursuant to an arbitration clause in a transportation worker's contract of employment. Under this Court's precedent, Prime cannot override that limitation by inserting a delegation clause into its contract.

Prime's entire argument to the contrary is merely a string of general platitudes about the Federal Arbitration Act, with no explanation of how these platitudes apply here. *See* Pet. 12-13. Prime states that this Court has held that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Pet. 12. But it fails to mention that this Court has expressly held that this presumption does *not* apply to delegation clauses. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995). And, in any case, the question here isn't the scope of Prime's delegation clause; it's whether a court has authority under the Federal Arbitration Act to enforce it. The Act is clear that it does not.

Prime also cites case law stating that the "overarching purpose" of the Federal Arbitration Act is "to ensure the enforcement of arbitration agreements according to their terms." Pet. 12. But, again, the question here is whether the Federal Arbitration Act applies at all. This Court has never adopted the nonsensical proposition that the Federal Arbitration Act ensures the enforcement of arbitration agreements that are explicitly *exempted* from the statute.

Moreover, even where the Federal Arbitration Act applies, this Court has identified numerous circumstances in which courts may—or even must—refuse to

enforce an arbitration agreement. *See, e.g.*, *Hall St.*, 552 U.S. at 586-89 (arbitration agreement conflicts with text of Federal Arbitration Act); *Vaden*, 556 U.S. at 62-63 (lack of subject matter jurisdiction); *Rent-A-Center*, 561 U.S. at 71 (specific arbitration clause at issue is unconscionable).

All the platitudes in the world cannot change the basic fact that a court simply cannot rely on the Federal Arbitration Act to compel arbitration if the Federal Arbitration Act does not apply. This Court has never held otherwise.

B. There Is No Split of Authority Worthy of this Court's Review.

The First and Ninth Circuits are the only Circuits to have considered in anything more than a cursory fashion whether the mere presence of a delegation clause means that a court must compel arbitration of the question whether it has authority to compel arbitration. Both circuits held that the answer, of course, is no.

Like the First Circuit, the Ninth Circuit rejected the contention that "contracting parties may invoke the authority of the" Federal Arbitration Act "to decide the question of *whether the parties can invoke the authority of the" Federal Arbitration Act. In re Van Dusen*, 654 F.3d 838, 844 (9th Cir. 2011) ("*Van Dusen I*"). The court explained that the Federal Arbitration Act "simply" has "no applicability" to a transportation worker's contract of employment. *See id.* Therefore, the court held, the Act cannot be used to compel arbitration under such a contract—regardless of whether there's a delegation clause. *See id.*

The trucking company in the Ninth Circuit case made the same argument Prime makes here—that a

court's authority to compel arbitration is a question of arbitrability that this Court permits parties to delegate to an arbitrator. *Van Dusen I*, 654 F.3d at 843. And, like the First Circuit here, the Ninth Circuit rejected that argument. *Id.* The court explained that under this Court's case law, questions of "arbitrability" are questions about "whether the parties have submitted a particular dispute to arbitration." *Id.* at 844. The question whether the Federal Arbitration Act "confers authority on the district court to compel arbitration" is not a question about whether the parties have submitted a particular dispute to arbitration. *Id.* It is not, therefore, a question of arbitrability. *Id.*

And while disputes about arbitrability may be delegated to an arbitrator, the Ninth Circuit observed, this "Court has never indicated that parties may delegate" determinations about the court's authority to compel arbitration. *Van Dusen I*, 654 F.3d at 844. "[O]n the contrary," it explained, this Court "has affirmed that, when confronted with an arbitration clause, the district court must first consider whether the agreement at issue is of the kind covered by the" Federal Arbitration Act—precisely the same position the First Circuit adopted here. *Id.*

In arguing that there is a circuit split worthy of this Court's review, Prime relies heavily on the Eighth Circuit's decision in *Green*. Pet. 8 (citing *Green v. SuperShuttle, Int'l, Inc.*, 653 F.3d 766 (8th Cir. 2011)). But that decision is cursory. It simply assumes—contrary to this Court's precedent—that all gateway questions are questions of arbitrability that may be delegated to an arbitrator. *Green*, 653 F.3d at 769. It fails to address this Court's decision in *Bernhardt*, which made clear that courts cannot rely on the

Federal Arbitration Act to enforce arbitration clauses if the statute does not apply. *See id.* And it does not even attempt to wrestle with the obvious consequence of forcing courts to compel arbitration under the Federal Arbitration Act without first determining whether the statute applies—that courts will end up violating the Act by relying on the statute in situations in which the statute explicitly prohibits courts from relying on it. *See id.*

Both Circuits that have actually analyzed this issue agree that before relying on the Federal Arbitration Act to compel arbitration, courts must first determine whether the Act applies. It's likely that once the Eighth Circuit has an opportunity to fully analyze the question, it too will adopt that obvious conclusion. And, if not, this Court can reconsider granting certiorari then.

The principle that courts cannot compel arbitration of the question whether they have authority to compel arbitration is so self-evident that there is no need for this Court to explicitly affirm it—at least not without some evidence that courts that fully consider the issue are getting it wrong.

III. PRIME AND ITS AMICI VASTLY OVERSTATE THE IMPACT OF THE DECISION BELOW.

Contrary to the dramatic lamentations of Prime and its amici, the First Circuit's ruling is not the end of arbitration in the transportation industry. *Cf.* Pet. 3. As the First Circuit itself explained in its decision, the inapplicability of the Federal Arbitration Act doesn't mean that arbitration agreements cannot be enforced. Pet. App. 34a. It merely means that state law—rather than federal—applies to their enforcement. *See, e.g.*,

Diaz v. Michigan Logistics Inc., 167 F. Supp. 3d 375, 380–81 (E.D.N.Y. 2016) (holding that even if contracts at issue were transportation workers' contracts of employment, exempt from the Federal Arbitration Act, the plaintiffs' "claims are subject to mandatory arbitration under New York arbitration law").

Indeed, on remand, Prime now seeks to compel arbitration pursuant to Missouri's arbitration statute—a fact the company conveniently fails to mention in its petition for certiorari. *See* Joint Statement, *Oliveira v. New Prime, Inc.*, No. 15-cv-10603, Docket No. 100, at 2-4 (D. Mass. Aug. 15, 2017).[13] Prime's argument to this Court that review is necessary because the decision below will have a "sweeping impact" is in direct conflict with its argument before the district court—that the First Circuit's decision has no impact at all because arbitration may still be compelled under Missouri law. *See id.*

As Prime's own arguments demonstrate, the company's contention that the First Circuit "effectively eliminated arbitration as a viable means of dispute resolution for the entire transportation industry" is false, Pet. 3. The First Circuit merely held that *one* means of enforcing arbitration—the Federal Arbitration Act—does not apply to a *limited* category of arbitration clauses—those contained in contracts of employment of transportation workers engaged in interstate commerce. Arbitration clauses that do not

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[13] Because Prime previously expressly disavowed reliance on Missouri law in moving to compel arbitration, Mr. Oliveira plans to argue that the company has waived this issue. Therefore, Prime may be unable to move to compel arbitration under state law in this case. But that's the result of Prime's own litigation decisions, not the First Circuit's interpretation of the Federal Arbitration Act.

fall into this narrow category are entirely unaffected. And even those that do fall into this category are not rendered unenforceable—they simply cannot be enforced under the *Federal* Arbitration Act. State law still applies.

Contrary to Prime and its amici's contention, the sky is not falling. Prime's own litigation conduct proves that. This Court should not grant certiorari based on a party's claims of public importance that the party's own conduct demonstrates are false.

IV. THIS CASE IS A POOR VEHICLE FOR REVIEW.

Even if Prime had raised issues worthy of this Court's review, this case is a poor vehicle for deciding them, because any decision by this Court would likely be irrelevant to whether the case is ultimately arbitrated or heard in court. *Cf. Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("We are not permitted to render an advisory opinion.").

First, even if this Court were to hold that the transportation worker exemption does not apply to independent contractors, Mr. Oliveira would still be entitled to demonstrate that Prime misclassified him, and that he was not, in fact, an independent contractor. It is quite likely he'd be able to do so. *See* Pet. App. 6a (describing allegations that although it labeled Mr. Oliveira an independent contractor, Prime "exercised significant control over his work"). The Federal Arbitration Act, therefore, still would not apply, and this Court's decision would have no impact on the case.

Second, Prime is still seeking to compel arbitration under Missouri law—despite the fact that the company expressly disclaimed any reliance on state law in its original briefing on its motion to compel. If

the district court finds that Prime has not waived its right to seek arbitration under state law, despite this explicit disclaimer, and if the court then compels arbitration under Missouri law, it won't matter whether the Federal Arbitration Act applies. And any decision from this Court on that issue will be irrelevant.

"It has long been [this Court's] considered practice not to decide abstract, hypothetical or contingent questions." *Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945). There is no reason to deviate from that practice here. There are two other cases currently pending before appellate courts on the issue of whether otherwise-exempt transportation workers are subject to the Federal Arbitration Act, simply because their employer labeled them independent contractors. There will, therefore, be more opportunities for this Court to consider this issue. There is no need for the Court to do so now, in a case where its decision will likely have no impact.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 17-340

IN THE
Supreme Court of the United States

NEW PRIME INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

Respondent's brief in opposition concedes two critical points, both of which counsel strongly in favor of granting New Prime, Inc.'s ("Prime") petition for a writ of certiorari.

First, respondent admits, as he must, that there is a circuit split on the first question presented: whether a dispute over applicability of the Federal Arbitration Act's ("FAA") Section 1 exemption is an arbitrability issue that must be resolved by an arbitrator pursuant to a valid delegation clause. Opp. 27-28. The First Circuit's holding that courts—and not arbitrators—must resolve the applicability of the Section 1 exemption, notwithstanding a valid delegation clause in the parties' agreement, is directly at odds with the Eighth Circuit's decision in *Green v. SuperShuttle International, Inc.*, 653 F.3d 766 (8th Cir. 2011), thereby exacerbating a preexisting split between the Eighth and Ninth Circuits. This admitted split of authority on an important question of federal law can only be resolved by this Court.

Second, respondent concedes that the First Circuit is the first and only federal court of appeals to hold that the term "contracts of employment" in Section 1 of the FAA encompasses independent-contractor agreements—i.e., contracts of *non*-employment. Opp. 15. That is a remarkable holding; the FAA was enacted nearly a century ago, and the consistent understanding and interpretation of the statute for nearly one hundred years has been the *opposite* of what the First Circuit now says it should be. *See* Pet. App. 51a ("[C]ourts generally agree that the § 1 exemption does not extend to independent contractors."). The First Circuit's counter-textual ruling not

only conflicts with decisions from the Ninth Circuit, the California Court of Appeal, and more than a dozen district courts around the country, it upsets the settled expectations of the entire transportation industry and leaves companies and workers with no viable means of ensuring their disputes are resolved in arbitration.

Not to worry, says respondent, because "the inapplicability of the Federal Arbitration Act . . . merely means that state law—rather than federal—applies to the[] enforcement" of arbitration agreements in the transportation industry. Opp. 28. But that assurance is cold comfort; the very purpose of the FAA is to overcome state-law hostility to arbitration, which still is rampant today. *See, e.g.*, *DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). In fact, contrary to respondent's contention in its brief before this Court, Opp. 30-31, respondent is well aware that Prime has determined *not* to move to compel arbitration of his claims under Missouri law, in part because of the challenges of enforcing arbitration agreements under the Missouri Uniform Arbitration Act, MO. STAT. § 435.350—challenges the company would not face under the FAA.

Without this Court's review, an entire sector of the economy, in a significant portion of the country, will be denied the benefits of arbitration and the protections of federal law, and the validity of millions of independent-contractor agreements will be cast into uncertainty. This Court should grant the petition and restore the federal presumption in favor of arbitration nationwide.

I. RESPONDENT CONCEDES THERE IS A CIRCUIT SPLIT ON THE DELEGATION QUESTION.

As the district court held, "the parties do not contest that the two operating agreements . . . contain valid delegation provisions," which encompass "the arbitrability of disputes between the parties." Pet. App. 55a. Notwithstanding this valid and enforceable delegation clause, however, the First Circuit held that the district court—and not an arbitrator—must decide whether the parties' dispute is arbitrable under Section 1 of the Federal Arbitration Act. Pet. App. 16a.

Respondent concedes that the First Circuit's ruling exacerbates a circuit split between the Eighth and Ninth Circuits, siding with the latter. Opp. 26-28 (discussing *Green*, 653 F.3d 766, and *In re Van Dusen*, 654 F.3d 838 (9th Cir. 2011) (*Van Dusen I*)). Respondent derides the Eighth Circuit's analysis as "cursory" and expresses hope that the Eighth Circuit will change its mind in some unspecified future litigation. Opp. 27-28. But this split of authority is affecting litigants *now*, and has already persisted for six years without any indication it will resolve itself.

Moreover, the position taken by the First and Ninth Circuits is untenable because it destroys the benefits of arbitration in cases like this one, where a transportation worker alleges he is misclassified as an independent contractor. As Judge Ikuta pointed out in her *Van Dusen III* dissent, for a court to determine whether the Section 1 exemption applies, it must resolve the very merits issue at the heart of the case—whether the worker is, in fact, an employee—even though the parties agreed to resolve that issue in arbitration. *See In re Swift Transp. Co.*, 830 F.3d 913,

920-21 (9th Cir. 2016) ("*Van Dusen III*") (Ikuta, J., dissenting) ("[B]y requiring the parties to litigate the underlying substance of Van Dusen's claim—whether the economic realities of Van Dusen's work for Swift made Van Dusen an employee for purposes of the FLSA—the district court risks depriving Swift of the benefits of its [arbitration] contract."). As a result, any eventual arbitration would likely be rendered moot—or at minimum, the issues left for the arbitrator to decide would be trivial.

Moreover, a district-court foray into the contours of the worker's relationship with the company violates this Court's admonition that "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *AT&T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649-50 (1986); *see also United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 568 (1960) ("The courts . . . have no business weighing the merits of the grievance.").

Respondent declares it "absurd" to think that a court might be required "to compel arbitration of the question whether they have authority under the Federal Arbitration Act to compel arbitration." Opp. 21. But there is nothing absurd or even unusual about that proposition. Any time the validity of an arbitration agreement, or the enforceability of the arbitration agreement by a particular party, is in dispute, a ruling that the agreement is invalid or cannot be enforced by the party filing the motion to compel would mean that the FAA does not apply. Yet courts routinely compel arbitration of such threshold jurisdictional issues. *See, e.g., Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010) (holding that arbitrator should decide whether the arbitration agreement was valid); *Danley*

v. Encore Capital Grp., Inc., 680 F. App'x 394, 398-99 (6th Cir. 2017) (holding that arbitrator should decide the "[p]laintiffs' various arguments regarding the validity of the assignment of the arbitration agreements" from the initial lender to the defendant); *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 211 (2d Cir. 2005) (holding that arbitrator should decide whether non-signatory to agreement could compel arbitration). The entire purpose of a delegation clause is to empower parties to agree to arbitrate threshold issues that would otherwise be decided by the court. *See Rent-A-Center, W., Inc.*, 561 U.S. at 70 (a delegation clause "is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce").

Respondent chastises the Eighth Circuit for "fail[ing] to address" this Court's decision in *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956). *See* Opp. 27-28. But *Bernhardt* is inapposite. There, the Court granted certiorari to resolve a question regarding the weight that state arbitration laws must be given in a federal diversity case under *Erie R.R. Co. v. Tompkins*, 58 S. Ct. 817 (1938)—*not* questions of how the FAA should be interpreted or the proper application of the Section 1 exemption. *Bernhardt*, 350 U.S. at 200. The Court discussed the FAA in limited fashion only, explaining that because the underlying contract was neither a "maritime transaction" nor a contract "involving commerce," the FAA provided no basis to avoid the *Erie* issue. *Id.* at 201 (quoting 9 U.S.C. § 2). There was no discussion, however, of whether the FAA requires questions of its applicability to be resolved *in court*. And even assuming that a court would resolve such questions in a typical case, *Bernhardt* is silent about whether parties can agree to alter that default rule through a delegation

clause. *Bernhardt*, therefore, says nothing about the key question here: whether courts must enforce agreements in which the parties expressly delegate threshold questions of arbitrability to the arbitrator.

II. Respondent Concedes That the First Circuit's Decision on the Scope of the FAA Section 1 Exemption Is an Outlier.

Respondent also concedes that the First Circuit is the "first federal Court of Appeals" to hold that the Section 1 exemption applies to independent contractors. Opp. 7-8. That fact would perhaps be "unremarkable" (Opp. 1) if this were a newly enacted statute in the early stages of judicial interpretation. But Congress enacted the FAA nearly a century ago and dozens of state and federal courts have interpreted and applied the Section 1 exemption over the past hundred years. Until now, the uniform interpretation of Section 1 has been "that the § 1 exemption does not extend to independent contractors." Pet. App. 51a. Thus, the First Circuit's decision is a novel outlier that shatters the longstanding expectations of companies and workers in the transportation industry.

The Ninth Circuit, for example, has explained that "applicability of the [Section 1] exemption" turns on "the question of whether an employer/employee relationship existed between the parties." *Van Dusen I*, 654 F.3d at 840, 846. Likewise, the California Court of Appeal has held that, when assessing the applicability of the Section 1 exemption, "[t]he question [is] whether a worker is an independent contractor or an employee[.]" *Performance Team Freight Sys., Inc. v. Aleman*, 241 Cal. App. 4th 1233, 1242 (Cal. Ct. App. 2015). More than a dozen district courts—including the district court below—have also held that independent contractor agreements are not "contracts of

employment" for Section 1 purposes. Pet. 10-11 (listing cases). As the district court in this case explained, "this construction comports well with 'the FAA's purpose of overcoming judicial hostility to arbitration' and the Supreme Court's instruction 'that the § 1 exclusion provision be afforded a narrow construction' in light of that purpose." Pet. App. 52a (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001)).

Respondent denies that the case law on this issue was uniform prior to the First Circuit's decision, citing two trial-court decisions that supposedly establish a preexisting "split of authority" regarding the scope of the Section 1 exemption. Opp. 18. Of course, if respondent were correct that the lower courts were divided on this issue even before the First Circuit's decision in this case, that would only bolster Prime's arguments for certiorari.

In fact, however, it is far from clear whether the "split" described in those two decisions refers to the *manner* in which a worker may prove his employment status for purposes of determining whether the Section 1 exemption applies, or rather to the *scope* of the Section 1 exemption. *See Owner-Operator Indep. Drivers Ass'n v. C.R. England, Inc.*, 325 F. Supp. 2d 1252, 1258 (D. Utah 2004) (holding that, "[f]or the purposes of § 1 of the FAA, it is not dispositive that Plaintiffs are categorized in the Operating Agreements as employees or independent contractors," and looking instead at the nature of the parties' relationship and the workers' job functions to determine whether their agreements are "contracts of employment"); *Pac. 9 Transp., Inc. v. Labor Comm'r*, No. BC 544496, at p. 5 (Cal. Super. Ct. July 8, 2014) (merely

citing and quoting the same *Owner-Operator Independent Drivers Ass'n* decision by the District of Utah, with no further discussion of the issue).[1]

If a worker is required to prove his employment status through evidence of his job functions and the nature of his relationship with the company in order to invoke the Section 1 exemption, as the District of Utah seems to have decided, then that means the Section 1 exemption must *not* encompass independent contractors categorically, as the First Circuit held. Thus, the two trial-court decisions cited by respondent appear to be aligned with the uniform body of precedent that predated the First Circuit's outlier ruling. It is the First Circuit that created the "split of authority." (Opp. 18.)

It is no surprise that courts were aligned on this issue for nearly 100 years before the First Circuit issued its decision; it requires little analysis or exposition to interpret the term "contracts of employment" to mean contracts of *employment*. Respondent contends that the concept of employment at the time the FAA was enacted was widely understood to encompass independent contractors. Opp. 12. But that is false. Indeed, just one year after passage of the FAA, this Court explained the difference between employees and independent contractors, finding that a group of workers were not "employees" because "the performance of their contract involved the use of judgment and discretion on their part and they were required to

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[1] The decision of the Los Angeles Superior Court cited by respondent is also irrelevant because it is non-citable under California rules and was issued before the California Court of Appeal addressed the Section 1 exemption issue in *Aleman*, 241 Cal. App. 4th 1233.

use their best professional skill to bring about the desired result." *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 520-21 (1926). As this Court held, the workers' alleged employer did not have "that control or right of control by the employer which characterizes the relation of employer and employee and *differentiates the employee or servant from the independent contractor*." *Ibid.* (emphasis added). Thus, contrary to respondent's contention, reading the phrase "contracts of employment" in the FAA to include independent-contractor agreements, as the First Circuit did in this case, defied the plain language of the statute in 1925 just as it does today.

Finally, respondent urges this Court to await another vehicle for resolving this conflict. According to respondent, the same issue "is currently pending before the Ninth and Eleventh Circuits." Opp. 19. A review of the briefs filed in those cases, however, reveals that the parties presented no such issue to those courts.[2] There is no reason to believe that either court

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[2] *See* Appellants' Br. at 5-6, *Van Dusen v. Swift Transp. Co.*, No. 17-15102 (9th Cir. May 24, 2017) (issue presented for review is whether, "in determining whether agreements are contracts of employment," the district court erred by failing "to focus solely on the words of the Contractor Agreements themselves, and by choosing instead (1) to examine the entirety of the relationship that developed between Plaintiffs and Defendants after the Contractor Agreements were signed, and (2) to conflate the terms of Plaintiffs' leases . . . with the terms of the Contractor Agreements with Swift"); Appellants' Br. at 1, *Gates v. TF Final Mile, LLC*, No. 16-17717 (11th Cir. Mar. 30, 2017) (issues presented are whether the district court erred by failing "to consider or even acknowledge . . . unrebutted sworn testimony and allegations in

[*Footnote continued on next page*]

of appeals will take the giant leap of declaring that the Section 1 exemption encompasses *all* independent contractors, as the First Circuit did here. This case is the best, and only, vehicle for resolving that pressing issue.

III. The First Circuit's Decision Prevents the Transportation Industry From Enjoying the Benefits of Arbitration.

There can be no serious dispute that the First Circuit's decision has significant implications for the American economy, resulting in widespread uncertainty for an industry that generates more than half a *trillion* dollars in annual revenue. Pet. App. 16-17; Chamber of Commerce of the United States of America, Amicus Br. 9-10; *see also* Am. Trucking Ass'n, *Trucking Industry Revenues Were $676.2 Billion in 2016*, https://www.prnewswire.com/news-releases/trucking-industry-revenues-were-6762-billion-in-2016-300503843.html (last visited December 1, 2017).

The decision prevents companies and workers in the transportation industry from enforcing arbitration agreements under the FAA—tossing aside the contractual preferences of hundreds of thousands of independent owner-operators in the trucking sector alone, not to mention the millions of workers engaged in other modes of transporting goods. Am. Trucking

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[*Footnote continued from previous page*]

the Complaint" which, appellant argues, show "that Gates and other drivers are employees and not independent contractors, and thus not subject to arbitration under Section 1 of the FAA," and whether the court therefore erred by holding "Gates and the other drivers were not subject to a contract of employment").

Ass'n, Amicus Br. 5; *see* Bureau of Labor and Statistics, *Transportation and Warehousing*, https://www.bls.gov/iag/tgs/iag48-49.htm#workforce (last visited December 1, 2017). Even arbitration agreements between one company and another are at risk of invalidity under the First Circuit's decision; in this case, for example, the court of appeals applied the Section 1 exemption to a contract between a corporation and a limited liability company. *See* Pet. App. 45a (noting that Mr. Oliveira executed the operating agreements "on behalf of Hallmark Trucking LLC").

It is no answer to say, as respondent does, that companies may still look to the patchwork of state arbitration acts for relief. Opp. 28. As this Court has seen on many occasions, state laws are often significantly more unfavorable to parties attempting to compel arbitration. *See Concepcion*, 563 U.S. at 341-42 (holding that FAA preempted California doctrine that prevented enforcement of class or collective action waivers); *DirectTV*, 136 S. Ct. at 468 (reversing California state ruling that again failed to place arbitration contracts "on equal footing with all other contracts") (internal citation omitted); *Mo. Title Loans, Inc. v. Brewer*, 131 S. Ct. 2875 (2011) (Mem.) (vacating Missouri Supreme Court decision in light of *Concepcion*).

Indeed, contrary to respondent's assertion (Opp. 30), Prime has not moved to compel arbitration of respondent's claims under Missouri law—and respondent is well aware that Prime has no intention of doing so in this case. Nor should litigants be forced to rely on Missouri law, which is far more hostile to arbitration than the FAA. Unlike the FAA, the Missouri Uniform Arbitration Act disallows the enforcement of arbitration agreements contained within contracts

deemed to be "contracts of adhesion," as well as all insurance contracts. MO. STAT. § 435.350. Missouri law also hinders parties who wish to enforce class action waivers like the one in Prime's agreements with respondent. *See* Pet. App. 104a ("The Parties specifically agree that no dispute may be joined with the dispute of another and agree that class actions under this arbitration provision are prohibited"); *Brewer v. Mo. Title Loans*, 323 S.W.3d 18, 23 (Mo. 2010) (en banc) (holding that the parties' class waiver was procedurally unconscionable), *vacated and modified as recognized in* 364 S.W.3d 486 (Mo. 2012) (addressing this Court's intervening decision in *Concepcion*, but finding that the agreement in question was nonetheless unconscionable).

Forcing the transportation industry to rely on the weaker protections of state arbitration laws undermines the "liberal federal policy favoring arbitration," *Concepcion*, 563 U.S. at 339 (citation omitted), and deprives an entire sector of the economy the benefits of arbitration. This Court's review is urgently needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 17-340

IN THE

Supreme Court of the United States

NEW PRIME INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF THE AMICUS CURIAE*

American Trucking Associations, Inc. (ATA), is the national association of the trucking industry. Its direct membership includes approximately 1,800 trucking companies and in conjunction with 50 affiliated state trucking organizations, it represents over 30,000 motor carriers of every size, type, and class of motor carrier operation. The motor carriers represented by ATA haul a significant portion of the freight transported by truck in the United States and virtually all of them operate in interstate commerce among the States. ATA regularly represents the common interests of the trucking industry in courts throughout the nation, including this Court.

Many of ATA's members contract with owner-operators—independent businesspersons who own one or more trucks and lease them to motor carriers, and either operate them themselves or supply drivers—to haul freight for them. And in many such arrangements, carriers and owner-operators enter into agreements to arbitrate disputes that may arise during the course of their business relationship. By agreeing to arbitrate, motor carriers and owner-operators alike avoid costly and protracted litigation, instead committing to rely on what both Congress and the courts have repeatedly endorsed as an efficient,

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* After timely notification, petitioner and respondent consented to the filing of this brief, and their consent letter has been filed with the Clerk's office. Pursuant to Rule 37.6, amicus states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than amicus, its members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

fair, and less adversarial means of dispute resolution. And they do so in the expectation that the Federal Arbitration Act (FAA) will require that those commitments be honored. Because the decision below renders those arbitration agreements unenforceable under the FAA, ATA and its members have a strong interest in this Court's review.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has repeatedly explained that "[t]he overarching purpose of the FAA * * * is to ensure the enforcement of arbitration agreements according to their terms." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 334 (2011). Section 1 of the FAA, however, exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. 1. That exception means that if motor carriers and their truck driver ***employees*** include an agreement to arbitrate disputes *in their employment contracts*, they cannot expect those agreements to be enforced under the FAA. See *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 119 (2001) ("Section 1 exempts from the **FAA** only contracts of employment of transportation **workers.**").

Nevertheless, the FAA plays an important role in other contractual relationships regularly entered into by motor carriers. In particular, many motor carriers frequently contract with independent businesses to haul cargo on their behalf. Often, motor carriers and their independent contractors will agree to arbitrate any disputes that arise between them (including, in some cases, the question whether a given dispute is arbitrable), with the expectation that the FAA will require them to honor those agreements.

The First Circuit's decision upends that expectation. As Petitioner explains, the decision below exacerbates an existing circuit split on the question whether parties can agree to let the arbitrator decide whether the Section 1 exception applies, and creates a new split in holding that the Section 1 exemption applies not just to agreements between motor carriers and their employees, but also to agreements between motor carriers and independent businesses that provide cargo-hauling equipment and services. Pet. 7-11.

Resolving the conflicts among the circuits on both of the questions presented in the petition is of broad importance to the trucking industry, which relies heavily on independent owner-operators to meet demand. The First Circuit's holding that applicability of the Section 1 exemption is always a question for the court, even when the parties expressly delegate questions of arbitrability to the arbitrator, Pet. App. 16a, would effectively nullify the advantages of arbitration in misclassification disputes—*i.e.*, disputes that turn on whether a given owner-operator is properly classified as an employee or an independent contractor—because in such cases the court's resolution of the gateway question is "so bound up" with the merits of the dispute as to constitute "the entire ball game." ***Rent-A-Center, W., Inc.*** v. ***Jackson,*** 561 U.S. 63, 87 (2010) (**Breyer, J.**, dissenting). **Given** the significant role of independent small businesses in the trucking industry, resolving the conflict among the circuits on that question alone would be enough to warrant review here.

But the First Circuit went much further, holding that *even if* the relationship between an owner-operator and a motor carrier is that of a bona fide

independent contractor, the Section 1 exemption for transportation-worker "contracts of employment" nevertheless applies. Pet. App. 33a. This sweeping, idiosyncratic holding means that owner-operators and carriers who agree to arbitrate disputes can *never* expect those agreements to be enforced under the FAA in cases brought within the First Circuit—despite the substantial benefits of arbitration to both parties, and their ability to keep down the costs of shipping the materials and goods that are the lifeblood of the national economy. This serious blow to the strong "federal policy favoring arbitration," *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), urgently demands this Court's review.

REASONS FOR GRANTING THE PETITION

I. The Business Relationships Between Motor Carriers and Independent Owner-Operators Are Crucial to the Trucking Industry, and This Court's Review Is Necessary to Resolve the Split Among the Circuits on the FAA's Applicability to Them.

A. In the trucking industry, the use of "owner-operators"—independent businesspersons who contract their services and lease their motor vehicle equipment to trucking companies pursuant to 49 U.S.C. 14102 and related regulations set forth at 49 C.F.R. § 376—is widespread and economically crucial. Their role in trucking operations has a history essentially as long as the industry itself. *See* Ex Parte No. MC 43 (Sub-No. 12), *Leasing Rules Modifications*, 47 Fed. Reg. 53858, 53860 (Nov. 30, 1982) ("Prior to the Motor Carrier Act of 1935, motor carriers regularly performed authorized operations in non-owned vehicles. To a large extent, ownership of these vehicles was vested in the persons who drove them,

commonly referred to as owner-operators."). More than sixty years ago, this Court noted the trucking industry's extensive use of leased equipment and drivers supplied by owner-operators. *Am. Trucking Ass'ns, Inc.* v. *United States*, 344 U.S. 298, 303 (1953) ("Carriers ... have increasingly turned to owner-operator truckers to satisfy their need for equipment as their service demands.").

Accurate, recent estimates of the number of independent owner-operators are difficult to obtain, but there is no question that they constitute a large segment of the industry. The Owner-Operator Independent Drivers Association—the trade association representing independent owner-operators and professional drivers—boasts over 158,000 members operating more than 240,000 trucks in the U.S. and Canada. *See* "OOIDA: Who We Are," *available at* http://www.ooida.com/WhoWeAre. The Census Bureau's 2002 Vehicle Inventory and Use Survey—the most recent comprehensive inventory of trucks nationwide—counted over 545,000 trucks primarily operated by owner-operators. U.S. Census Bureau, *2002 Vehicle Inventory and Use Survey* 15, 39 (Dec. 2004), *available at* http://www.census.gov/prod/ec02/ec02tv-us.pdf. These independent contractors play a crucial role not just in long-haul over-the-road trucking operations, but in every sector of the trucking industry, from moving shipping containers from ports to nearby distribution centers, to nationwide express package delivery.

For trucking companies, independent contractors provide a number of advantages. Independent owner-operators often are mature, experienced drivers who are highly skilled, with proven safety records, and highly motivated. The availability of such owner-

operators and their equipment enables carriers to save on equipment and capital costs, and provides the flexibility necessary to meet fluctuations in demand for trucking services. As the Court has explained,

> [d]emand for a motor carrier's services may fluctuate seasonally or day by day. Keeping expensive equipment operating at capacity, and avoiding the waste of resources attendant upon empty backruns and idleness, are necessary and continuing objectives. It is natural, therefore, that a carrier that finds itself short of equipment necessary to meet an immediate demand will seek the use of a vehicle not then required by another carrier for its operations, and the latter will be pleased to accommodate. Each is thereby advantaged.

Transamerican Freight Lines, Inc. v. *Brada Miller Freight Sys.*, 423 U.S. 28, 35 (1975). Contracting with independent businesses to supply capacity is, in short, critical to the ability of motor carriers to remain nimble and competitive in the face of inevitable fluctuation in demand for hauling freight.

B. Independent contracting provides significant advantages to owner-operators as well. By successfully and skillfully managing operations, an independent contractor can grow his or her own business, whether by productively performing services him or herself, or by hiring employees to provide additional services. *See, e.g.*, Philip J. Romero, *The Economic Benefits of Preserving Independent Contracting* 30 (Sept. 2011), *available at* http://www.cbrt.org/wp-content/uploads/2012/04/Final-Romero-Report.pdf. Owner-operators who drive their own trucks typically outearn similarly situated employee drivers by a significant margin: as one

industry expert stated, "the average owner-operator fares better than company driver counterparts," with a net income of $51,912 compared to "about $40,000 per year for the same amount of work" by an employee driver. Rip Watson, *Owner-Operators Make More Income, Freight-Rate Gains, Industry Expert Says*, Transport Topics, Sept. 23, 2013, at 12.

But independent owner-operators have the opportunity to do far more than simply make more money by personally hauling freight. Because business start-up costs in the trucking industry are comparatively modest—consisting principally of the cost of a power unit and various licensing and insurance fees—trucking provides independent contractors an affordable opportunity to start their own businesses. Entrepreneurial owner-operators can purchase additional trucks and trailers, and employ drivers and other staff to carry out and expand their business. Independent contracting in the trucking industry allows owner-operators to be their own bosses, and to nurture their own enterprises. Indeed, some of today's largest trucking companies—including the petitioner here—grew from a single-truck operation. *See* Prime Inc. Company History, http://www.primeinc.com/company-history.

II. Review Is Warranted Because the Decision Below Undermines the Federal Policy Favoring Arbitration, to the Detriment of Motor Carriers and Independent Owner-Operators.

Petitioner explains why the First Circuit erred in holding that the phrase "contracts of employment" in Section 1 encompasses agreements between motor carriers and independent owner-operators. Pet. 13-16. The effect of that holding is to broadly eliminate the

ability of trucking businesses to rely on arbitration under the FAA. As long as the split on the questions presented in this case persist, motor carriers and independent contractors alike will be unable to predict, *ex ante*, whether an agreement to arbitrate disputes will be enforceable, because enforceability will turn on the Circuit within which a claim is brought—a concern that is particularly acute in an industry, like trucking, where workers constantly move across state lines and from one part of the country to another. Between this uncertainty and the forum-shopping that it would encourage, such arbitration agreements will have little, if any, value. This Court's review is urgently needed to provide the trucking industry with clarity, and so that motor carriers and owner-operators can take advantage of the national policy favoring arbitration as an efficient alternative to resolving disputes in court.

A. Success in the trucking industry, for carriers and owner-operators alike, presents any number of challenges, with fierce competition resulting in low margins. Unsurprising, then, that carriers and owner-operators aggressively pursue measures that promote efficiency. Like any number of other businesses, trucking businesses frequently agree to arbitrate disputes that may arise between them in the course of their relationship. Motor carriers and independent contractors turn to arbitration because—as Congress has repeatedly found—arbitration allows parties to avoid the "delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation of business disputes." Y2K Act of 1999, Pub. L. No. 106-37 § 2(a)(3)(B)(iv), 113 Stat. 185, 186; *see also* H.R. Rep. No. 68-96, at 2 (1924) ("the costliness and delays of litigation ... can be largely eliminated by agreements for arbitration");

H.R. Rep. No. 97-542, at 13 (1982) (arbitration is "cheaper and faster than litigation," has "simpler procedural and evidentiary rules," "minimizes hostility," and is "more flexible in regard to scheduling"). As this Court has put it, in arbitration, "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010).

The decision below ensures that arbitration will be adopted less widely, if at all, in contracts between carriers and independent owner-operators. After all, if the parties to the agreement know that it can be unilaterally repudiated by either party when a dispute arises, they will have little incentive to choose arbitration in the first place. As a result, motor carriers will no longer be able to count on arbitration as a lower-cost, more efficient alternative to litigation as a means of resolving disputes with owner-operators.

B. But motor carriers are not the only losers under the First Circuit's decision: while the plaintiff in *this case* may have concluded that he would fare better in court than in arbitration, for owner-operators faced with relatively small, individual disputes with a motor carrier, arbitration may well be the only realistic opportunity to vindicate their rights. As the Court has observed, "arbitration's advantages often would seem helpful to individuals ... who need a less expensive alternative to litigation." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995). Without recourse to arbitration, someone "who has

only a small damages claim (who seeks, say, the value of only a defective refrigerator or television set)" is left "without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery." *Id.* at 281.

The same would be true of any number of inherently individualized disputes that regularly arise between motor carriers and owner-operators—say, a payment dispute over a few thousand dollars. Such a claim (unless it was low enough to be resolved in small claims court) might be too small for an owner-operator to pursue in a potentially long, expensive lawsuit, even if he or she is confident of ultimately prevailing. But such a dispute might very well be worth pursuing in arbitration, where the reduced procedural and evidentiary burdens mean a party can resolve a claim more efficiently and expeditiously than they could in court—depending on the circumstances, perhaps without the expense of a lawyer at all.[1]

In short, for many owner-operators, "it looks like arbitration—or nothing." Theodore St. Antoine, *Mandatory Arbitration: Why It's Better Than It*

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[1] In principle, owner-operators would be free to simply adhere to an arbitration agreement when they felt that they could vindicate a particular dispute more readily in arbitration than in court, without recourse to enforcement under the FAA. As a practical matter, however, if carriers and contractors cannot count on their arbitration agreements being enforced, they will be unlikely to enter into them in the first place. And even if they do, what's sauce for the goose is sauce for the gander: the First Circuit's holding would allow motor carriers as well as owner-operators to walk away from their arbitration agreements when a dispute arises, if they see a tactical advantage in doing so.

Looks, 41 U. Mich. J.L. Reform 783, 792 (2008). If the First Circuit's decision is allowed to stand, the inevitable result will be that any number of meritorious claims that owner-operators could have cost-effectively vindicated in arbitration will go unremedied.

C. Finally, this disincentive to arbitration is a losing proposition for the shippers and consumers the trucking industry serves. Arbitration permits a business to resolve disputes more cheaply, and those "cost-saving benefits ... are reflected in a lower cost of doing business that in competition are passed along to customers." *Boomer* v. *AT&T Corp.*, 309 F.3d 404, 419 (7th Cir. 2002) (internal quotation marks and citation omitted); *see also* Stephen Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251, 254-255 (2006) (arbitration "lower[s] [businesses'] dispute-resolution costs," and this "benefit to business[] is also a benefit to consumers" because "whatever lowers costs to businesses tends over time to lower prices to consumers"). Given the pervasive role of trucking in delivering the goods on which the nation and its economy depend, this is, cumulatively, no small consideration. *See, e.g.*, American Trucking Associations, *American Trucking Trends* 5 (2017) (in 2016, transportation by truck represented 79.8% of the nation's primary shipment freight bill, and 70.6% of domestic tonnage).

CONCLUSION

For the foregoing reasons, and those stated in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

Many of the Chamber's members and affiliates regularly rely on arbitration agreements in their contractual relationships. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the legislative policy reflected in the Federal Arbitration Act ("FAA"), the Chamber's members have structured millions of contractual relationships—including large numbers of agreements with independent contrac-

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for both parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. Both parties have consented to the filing of this brief, and their written consents have been filed with the Clerk.

tors—around the use of arbitration to resolve disputes.

The Chamber has a strong interest in the questions presented by the petition. In particular, the First Circuit's decision announcing that the FAA does not apply to independent contractors in the transportation industry conflicts with the decisions of two appellate courts and numerous other courts. The decision accordingly means that the FAA applies to arbitration agreements with an independent contractor in California or New York but not to agreements with an identically situated contractor in Massachusetts. That lack of uniformity undermines the reliance by the Chamber's members and affiliates on the national policy favoring arbitration, and should not be permitted to stand.

INTRODUCTION AND SUMMARY OF ARGUMENT

Independent contractors play an essential role in the modern economy. According to one study, between 2010 and 2014, the number of independent contractors "increased by 2.1 million workers," accounting for "28.8 percent of all jobs added." Will Rinehart & Ben Gitis, *Independent Contractors And The Emerging Gig Economy*, American Action Forum (July 29, 2015), https://tinyurl.com/zevgo4s. That "number is expected to keep growing at a steady clip." Brendon Schrader, *Here's Why The Freelancer Economy Is On The Rise*, Fast Company (Aug. 10, 2015), https://tinyurl.com/ya5b78as.

Participants in this large, and rapidly expanding, sector of the economy rely upon the enforceability of agreements between businesses and independent contractors. Many such agreements provide for arbi-

tration of any disputes that may arise, because arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court.

If the decision below is allowed to stand, however, untold thousands of independent contractors would have their arbitration agreements called into question. Specifically, the panel majority below held that Section 1 of the FAA's narrow exclusion of "contracts of *employment*" involving transportation workers also eliminates the FAA's protection of arbitration agreements entered into by independent contractors. 9 U.S.C. § 1 (emphasis added).

That holding creates a conflict with *every* other appellate and district court to consider the issue. And it is wrong on the merits—especially in light of this Court's admonitions that Section 1 must be given a "narrow construction" and "precise reading." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 118, 119 (2001).

The distinction between employees and independent contractors is well established in the law, and was settled at the time the FAA was enacted in 1925. Indeed, this Court made clear in *Circuit City* that the exemption to arbitration contained in Section 1 was designed to avoid conflicts with existing or impending federal statutes that had their own alternative dispute-resolution mechanisms for certain kinds of *employees*, such as "seamen," "railroad employees," and "employees" of "air carriers." 532 U.S. at 120-21. But those other federal statutes do not reach independent contractors, and therefore it would make little sense for Congress to have shoehorned independent contractors into Section 1's exemption.

This Court's review is essential to clarify the important and frequently recurring issue of whether the FAA excludes independent contractors in the transportation industry.

ARGUMENT

I. The Decision Below Is Inconsistent With The Text And Structure Of Section 1.

Section 1 of the FAA provides that the statute's federal protections for arbitration agreements do not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Prior to the decision below, courts uniformly understood the phrase "contracts of employment" in this Section to mean what it says: a contract between an employer and an employee—not an agreement with an independent contractor to perform work.

As the petition details, the decision below squarely conflicts with the views of two appellate courts—the Ninth Circuit in *In re Van Dusen III*, 830 F.3d 913 (9th Cir. 2016), and the California Court of Appeal in *Performance Team Freight Systems, Inc.* v. *Aleman*, 241 Cal. App. 4th 1233 (2015)—and over a dozen federal district court decisions in a number of other circuits. Pet. 8-11. That conflict is reason enough for this Court's review.

Review is also warranted because the decision below conflicts with this Court's precedents and the text and structure of Section 1. In going its own way, the First Circuit brushed aside the uniform contrary case law as (in its view) insufficiently reasoned. But while the panel denigrated many of these decisions as "simply assum[ing] * * * that independent-contractor agreements are not contracts of employ-

ment under § 1" (Pet. App. 21a), any such assumption rested on the plain language of the statute—language with an unambiguous meaning. The panel majority itself acknowledged that *Black's Law Dictionary* treats "contract of employment" as synonymous with "employment contract"—the first usage of which was from 1927—and defines that term as one would expect: as a "contract between an *employer* and *employee* in which the terms and conditions of employment are stated." Pet. App. 26a n.19 (quoting BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added)).

But the panel majority instead relied on dictionary definitions of the broader verb "employ" and various instances where the phrase "contract of employment" was used outside the context of the FAA (or any other federal statute) to conclude that Congress must have meant to exempt independent contractors under Section 1. That inflation of the provision's reach beyond its plain meaning conflicts with this Court's instruction to give "the § 1 provision * * * a narrow construction." *Circuit City*, 532 U.S. at 118.

The panel majority also failed to recognize that its interpretation is inconsistent with the context in which the exemption in Section 1 was enacted—against the backdrop of other federal laws that *do* recognize the long-established distinction between employees and independent contractors.

In *Circuit City*, this Court explained at length that the residual category of "workers engaged in * * * commerce" must be "controlled and defined by reference to the enumerated categories of workers which are recited just before it"—namely, "seamen" and "railroad employees." 532 U.S. at 115. And the

Court explained that "seamen" and "railroad employees" were excluded from the FAA because "[b]y the time the FAA was passed, Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their employers"; "grievance procedures existed for railroad employees under federal law"; "and the passage of a more comprehensive statute providing for the mediation and arbitration of railroad labor disputes was imminent." *Id.* at 121 (citing, respectively, the Shipping Commissioners Act of 1872, 17 Stat. 262; Transportation Act of 1920, 41 Stat. 456; and Railway Labor Act of 1926, 44 Stat. 577).

As this Court summarized, "[i]t is reasonable to assume that Congress excluded 'seamen' and 'railroad employees' from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers." *Circuit City*, 532 U.S. at 121. And the Court explained that the residual category of other transportation workers was included because Congress contemplated extending similar legislation to other categories of employees: "Indeed, such legislation was soon to follow, with the amendment of the Railway Labor Act in 1936 to include air carriers and their employees." *Id.*

Significantly, these other federal statutes were, and are, limited in scope to *employees*, as that term is traditionally understood. For example, the Railway Labor Act defines "employee" by incorporating ordinary common-law concepts of direction and control: "[t]he term 'employee' as used herein includes every person in the service of a carrier (subject to *its continuing authority to supervise and direct the manner of rendition of his service*) who performs any work de-

fined as that of an *employee* or subordinate official." Railway Labor Act of 1926, § 1, Pub. L. No. 69-257, 44 Stat. 577 (emphases added).

Other federal laws governing railroad workers and seamen point in the same direction. They also adopt the common-law approach to who counts as an "employee"—and therefore necessarily incorporate the distinction between an employee and an independent contractor.

The Federal Employers' Liability Act was enacted in 1908, and applies only to "employee[s]" who are injured "while * * * employed by" a "common carrier by railroad." 45 U.S.C. § 51. As this Court has held, "[f]rom the beginning the standard" for application of FELA "has been proof of a master-servant relationship between the plaintiff and the defendant railroad." *Kelley* v. *S. Pac. Co.*, 419 U.S. 318, 323 (1974). In reaching that holding, the Court reiterated its pronouncement from a decade *prior* to the enactment of the FAA that "the words 'employee' and 'employed' in the statute were used in their natural sense, and were 'intended to describe the conventional relation of employer and employee.'" *Id.* (quoting *Robinson* v. *Baltimore & Ohio R. Co.*, 237 U.S. 84, 94 (1915)).

The Jones Act, which was enacted in 1920, extended the same principles previously enacted in FELA to seamen, providing that "[a] seaman injured in the course of *employment* * * * may elect to bring a civil action at law * * * against the *employer*. Laws of the United States regulating recovery for personal injury to, or death of, a railway *employee* apply to an action under this section." 46 U.S.C. § 30104 (formerly codified at 46 U.S.C. § 688) (emphases added); see also, *e.g.*, *Chandris, Inc.* v. *Latsis*, 515 U.S. 347, 368-72 (1995) (describing the "essential contours of

the employment-related connection to a vessel in navigation required for an employee to qualify as a seaman under the Jones Act"); *Bach* v. *Trident Shipping Co., Inc.*, 708 F. Supp. 772, 773 (E.D. La. 1988) ("It is by now well established that an employer-employee relationship is essential for recovery under the Jones Act.").

The line drawn in these specific statutory contexts also is consistent with this Court's broader pronouncement that when Congress uses the term "employee" in a statute without "helpfully defin[ing] it," Congress means "to incorporate traditional agency law criteria for identifying master-servant relationships." *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 319, 321 (1992) (construing Congress's definition of "employee" in ERISA); see also *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739-40 (1989) (using same mode of analysis to determine whether a statue had been, in the language of the Copyright Act of 1976, "prepared by an employee within the scope of his or her employment"). Incorporating these traditional principles therefore also encompasses "the common understanding * * * of the difference between an employee and an independent contractor." *Darden*, 503 U.S. at 327.

Finally, there is nothing "strange" (Pet. App. 29a) about Congress' decision in the FAA to exempt from its coverage only those transportation workers who were subject to "more specific legislation," such as "established or developing statutory dispute resolution schemes." *Circuit City*, 532 U.S. at 121. A more modern example of the same congressional approach, for example, can be seen in the Class Action Fairness Act, which "carves out" from its conferral of jurisdiction "class actions for which jurisdiction ex-

ists elsewhere under federal law, such as under the Securities Litigation Uniform Standards Act." *Estate of Pew* v. *Cardarelli*, 527 F.3d 25, 30 (2d Cir. 2008) (citing 28 U.S.C. § 1332(d)(9)(A)).

In short, the text and structure of the FAA confirm that Section 1's exemption for "contracts of employment" of transportation workers applies only to employees, not independent contractors.

II. The Question Presented Is A Recurring One Of Exceptional Importance.

Review is also warranted because interpreting Section 1 to exempt independent contractors from the FAA carries very significant real-world adverse consequences. That interpretation forecloses the entire transportation sector from obtaining the benefits of arbitration as secured by the FAA.

This Court recognized in *Circuit City* that "there are real benefits to the enforcement of arbitration provisions," including "allow[ing] parties to avoid the costs of litigation." 532 U.S. at 122-23; see also, *e.g.*, *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution.").

Numerous businesses enter into agreements with independent contractors. See Rinehart & Gitis, *supra*; Schrader, *supra*. Businesses in the transportation industry are no exception. This Court recognized over sixty years ago that transportation "[c]arriers * * * have increasingly turned to owner-operator truckers to satisfy their need for equipment as their service demands." *Am. Trucking Ass'ns, Inc.* v. *United States*, 344 U.S. 298, 303 (1953). More recently, the Census Bureau reported that over half a million trucks nationwide are primarily operated by

owner operators. See U.S. Census Bureau, *2002 Economic Census: Vehicle Inventory and Use Survey* 15, 39 (Dec. 2004), https://tinyurl.com/yb4yy3ed.

But if the decision below is permitted to stand, businesses in the transportation industry could be deprived of the simplicity, informality, and expedition of arbitration for resolving disputes with independent contractors. And the resulting increase in litigation costs would ultimately be borne by consumers in the form of higher prices and by independent contractors who receive lower payments.

Moreover, this Court has long recognized that "private parties have likely written contracts relying on [its FAA precedent] as authority." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995). And as the sheer volume of conflicting authority demonstrates (see Pet. 9-11), numerous businesses have indeed relied on the FAA in including arbitration provisions in their agreements with independent contractors.

The decision below, however, deprives businesses of the ability to rely upon the uniform national policy favoring arbitration embodied by the FAA. Instead, they will be able to obtain the benefits of arbitration, if at all, only under a patchwork of state laws that lack the FAA's protection against rules that "single[] out arbitration agreements for disfavored treatment." *Kindred Nursing Ctrs. Ltd. P'Ship* v. *Clark*, 137 S. Ct. 1421, 1425 (2017). And the enforceability of their arbitration agreements will depend entirely on the forum in which suit is brought: an agreement that is fully enforceable under the FAA in California or New York will not be enforceable in Massachusetts. Review is critical to remedy that troubling lack of uniformity in the FAA's application.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2017

No. 17-340

IN THE

Supreme Court of the United States

NEW PRIME, INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

On Writ of Certiorari
To The United States Court Of Appeals
For The First Circuit

JOINT APPENDIX

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General Docket

United States Court of Appeals for the First Circuit

Court of Appeals Docket #: 15-2364	**Docketed:** 11/19/2015
Nature of Suit: 3710 Fair Labor Standards Act	**Termed:** 05/12/2017

Oliveira v. New Prime, Inc.

Appeal From: District of Massachusetts, Boston

Fee Status: filing fee paid

Case Type Information:

1) civil

2) private

3) labor (not NLRB)

Originating Court Information:

District: 0101-1 : 1:15-cv-10603-PBS **Lead:** 1:15-cv-10603-PBS

Court Reporter: Lee Alice Marzilli

Ordering Judge: Patti B. Saris, U.S. District Judge

Date Filed: 03/04/2015

Date Order/Judgment: 10/27/2015	**Date Order/Judgment EOD:** 10/27/2015
Date NOA Filed: 11/12/2015	**Date Rec'd COA:** 11/13/2015

Prior Cases:

None

Current Cases:

None
DOMINIC OLIVEIRA, on his behalf and on behalf of all others similarly situated Plaintiff - Appellee v. NEW PRIME, INC. Defendant - Appellant

11/19/2015	40 pg, 357.7 KB	CIVIL CASE docketed. Notice of appeal (doc. #62) filed by Appellant New Prime, Inc.. Docketing Statement due 12/03/2015. Transcript Report/Order form due 12/03/2015. Appearance form due 12/03/2015. [15-2364] (CP) [Entered: 11/19/2015 12:51 PM]
11/23/2015	1 pg, 51.05 KB	NOTICE of appearance on behalf of Appellant New Prime, Inc. filed by Attorney William E. Quirk. Certificate of service dated 11/23/2015. [15-2364] (WEQ) [Entered: 11/23/2015 03:02 PM]
11/23/2015	2 pg, 93.42 KB	NOTICE of appearance on behalf of Appellant New Prime, Inc. filed by Attorney Robert J. Hingula. Certificate of service dated 11/23/2015. [15-2364] (RJH) [Entered: 11/23/2015 04:14 PM]
11/23/2015	2 pg, 108.73 KB	TRANSCRIPT report/order form filed by Appellant New Prime, Inc. indicating transcripts are not necessary for this appeal. Certificate of service dated

		11/23/2015. [15-2364] (RJH) [Entered: 11/23/2015 04:25 PM]
11/23/2015	4 pg, 164.11 KB	DOCKETING statement filed by Appellant New Prime, Inc.. Certificate of service dated 11/23/2015. [15-2364] (RJH) [Entered: 11/23/2015 04:29 PM]
11/23/2015	1 pg, 61.58 KB	NOTICE of appearance on behalf of Appellant New Prime, Inc. filed by Attorney James C. Sullivan. [15-2364] (JCS) [Entered: 11/23/2015 05:46 PM]
12/02/2015	31 pg, 188.64 KB	ELECTRONIC SUPPLEMENTAL record filed consisting of district court docket entry nos. 63, 64, 65, 69, 70 (order granting motion for stay). [15-2364] (CP) [Entered: 12/02/2015 10:27 AM]
12/03/2015	1 pg, 29.82 KB	NOTICE of appearance on behalf of Appellee Dominic Oliveira filed by Attorney Hillary Schwab. Certificate of service dated 12/03/2015. [15-2364] (HAS) [Entered: 12/03/2015 09:50 AM]
12/03/2015	1 pg, 29.82 KB	NOTICE of appearance on behalf of Appellee Dominic Oliveira filed by Attorney Brant Casavant. Certificate

		of service dated 12/03/2015. [15-2364] (BC) [Entered: 12/03/2015 09:52 AM]
12/07/2015	1 pg, 275.08 KB	Mail returned as undeliverable to Attorney Jill M. Borgonzi for Appellants New Prime, Inc. and New Prime, Inc. Copy of November 19, 2015 case opening notice. Forwarded to Polsinelli, PC, 900 W 48th Place, Suite 900, Kansas City, MO 64112. [15-2364] (CP) [Entered: 12/07/2015 10:19 AM]
12/14/2015	4 pg, 10.51 KB	STATEMENT of the issues filed by Appellant New Prime, Inc.. Certificate of service dated 12/14/2015. [15-2364] (RJH) [Entered: 12/14/2015 09:44 AM]
12/18/2015	2 pg, 65.76 KB	NOTICE issued. After 01/04/2016, the following attorneys will no longer receive notice of court issued documents in this case unless they register for an appellate ECF account: Jill M. Borgonzi for New Prime, Inc., Judith A. Leggett for New Prime, Inc. and Andrew Schmidt for Dominic Oliveira. [15-2364] (CP) [Entered: 12/18/2015 04:18

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12/30/2015	8 pg, 247.21 KB	BRIEFING schedule set. Brief due 02/08/2016 for appellant New Prime, Inc.. Appendix due 02/08/2016 for appellant New Prime, Inc.. Pursuant to F.R.A.P. 31(a), appellee's brief will be due 30 days following service of appellant's brief and appellant's reply brief will be due 14 days following service of appellee's brief. [15-2364] (CP) [Entered: 12/30/2015 01:06 PM]
12/30/2015	2 pg, 48.38 KB	NOTICE of appearance on behalf of Appellant New Prime, Inc. filed by Attorney Judith A. Leggett. Certificate of service dated 12/30/2015. [15-2364] (JAL) [Entered: 12/30/2015 02:22 PM]
01/13/2016	3 pg, 8.64 KB	UNOPPOSED MOTION to extend time to file brief filed by Appellant New Prime, Inc.. Certificate of service dated 01/13/2016. [15-2364]. CLERK'S NOTE: Docket entry was edited to modify the docket text. (RJH) [Entered: 01/13/2016 12:08 PM]

01/13/2016	2 pg, 6.07 KB	CORPORATE disclosure statement filed by Appellant New Prime, Inc.. Certificate of service dated 01/13/2016. [15-2364] (RJH) [Entered: 01/13/2016 12:09 PM]
01/13/2016	1 pg, 6.45 KB	ORDER granting motion to extend time to file brief and appendix filed by Appellant New Prime, Inc. Brief and appendix due 03/09/2016 for appellant New Prime, Inc. [15-2364] (CP) [Entered: 01/13/2016 12:36 PM]
02/01/2016	1 pg, 75.49 KB	NOTICE of appearance on behalf of Appellee Dominic Oliveira filed by Attorney Andrew Schmidt. [15-2364] (AAS) [Entered: 02/01/2016 12:12 PM]
03/09/2016	2 pg, 6.32 KB	NOTICE issued. The following attorney has failed to register for an appellate ECF account and will no longer receive notice of court issued documents in this case: Jill M. Borgonzi for New Prime, Inc.. [15-2364] (CP) [Entered: 03/09/2016 03:57 PM]
03/09/2016	63 pg, 166.27	BRIEF tendered by Appellant New Prime, Inc.. Cer-

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03/10/2016	65 pg, 335.05 KB	APPELLANT'S BRIEF filed by Appellant New Prime, Inc.. Certificate of service dated 03/09/2016. Brief due 04/11/2016 for APPELLEE Dominic Oliveira. Nine paper copies identical to that of the electronically filed brief must be submitted so that they are received by the court on or before 03/17/2016. [15-2364] (KC) [Entered: 03/10/2016 10:29 AM]
03/10/2016	1 pg, 21.96 KB	CORPORATE disclosure statement filed by Appellant New Prime, Inc.. Certificate of service dated 03/09/2016. [15-2364] (KC) [Entered: 03/10/2016 10:30 AM]
03/10/2016		APPENDIX filed by Appellant New Prime, Inc.. Number of volumes: 1. Number of copies: 5. Certificate of service dated 03/09/2016. [15-2364] (KC) [Entered: 03/10/2016 02:57 PM]
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		appellant/petitioner brief [5983455-2] submitted by Appellant New Prime, Inc.. [15-2364] (CC) [Entered: 03/11/2016 12:32 PM]
03/14/2016	3 pg, 73.44 KB	ASSENTED TO MOTION to extend time to file brief filed by Appellee Dominic Oliveira. [15-2364]. CLERK'S NOTE: Docket entry was edited to modify the docket text. (AAS) [Entered: 03/14/2016 02:16 PM]
03/17/2016	1 pg, 4.73 KB	ORDER granting motion to extend time to file brief filed by Appellee Dominic Oliveira. Brief due 06/10/2016 for appellee Dominic Oliveira. We are disinclined to grant a request for further enlargement of this deadline. [15-2364] (CP) [Entered: 03/17/2016 01:44 PM]
06/08/2016	2 pg, 20.36 KB	NOTICE of appearance on behalf of Appellee Dominic Oliveira filed by Attorney Jennifer D. Bennett. Certificate of service dated 06/08/2016. [15-2364] (JB) [Entered: 06/08/2016 03:13 PM]
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06/13/2016	3 pg, 8.37 KB	MOTION to extend time to file *reply brief* filed by Appellant New Prime, Inc.. Certificate of service dated 06/13/2016. [15-2364] (RJH) [Entered: 06/13/2016 02:26 PM]
06/14/2016	78 pg, 2.06 MB	APPELLEE'S BRIEF filed by Appellee Dominic Oliveira. Certificate of service dated 06/10/2016. Reply brief due 06/27/2016 for APPELLANT New Prime, Inc.. Nine paper copies identical to that of the electronically filed brief must be submitted so that they are received by the court on or before 06/21/2016. [15-2364] (GRC) [Entered: 06/14/2016 03:11 PM]
06/15/2016	1 pg, 21.17 KB	NOTICE of appearance on behalf of Movant(s) Professor Richard H. Frankel filed by Attorney Richard H. Frankel. Certificate of service dated 06/15/2016. [15-2364] (RHF) [Entered: 06/15/2016 12:45 PM]

06/15/2016	42 pg, 212.67 KB	MOTION for leave to file amicus curiae brief in support of Appellee filed by Movant(s) Professor Richard H. Frankel. Certificate of service dated 06/15/2016. [15-2364] (RHF) [Entered: 06/15/2016 12:47 PM]
06/15/2016	1 pg, 6.29 KB	ORDER granting motion to extend time to file reply brief filed by Appellant New Prime, Inc. Reply brief due 07/22/2016 for appellant New Prime, Inc. [15-2364] (KC) [Entered: 06/15/2016 04:07 PM]
06/16/2016		NINE (9) paper copies of appellee/respondent brief [6008377-2] submitted by Appellee Dominic Oliveira. [15-2364] (CC) [Entered: 06/16/2016 10:13 AM]
06/21/2016	35 pg, 224.34 KB	PLEADING tendered: Amicus Curiae brief filed by Movant Richard H. Frankel. Certificate of service dated 06/15/2016. [15-2364] (CP) [Entered: 06/21/2016 10:37 AM]
07/08/2016	1 pg, 82.52 KB	ORDER granting motion for leave to file amicus curiae brief filed by Richard H. Frankel. [15-2364] (CP) [Entered: 07/08/2016 08:47

		AM]
07/08/2016	35 pg, 224.34 KB	AMICUS CURIAE BRIEF filed by Amicus Curiae Richard H. Frankel in support of Appellee. Certificate of service dated 06/15/2016. Nine paper copies identical to that of the electronically filed brief must be submitted so that they are received by the court on or before 07/15/2016. [15-2364] (CP) [Entered: 07/08/2016 08:54 AM]
07/13/2016		NINE (9) paper copies of amicus brief [6015540-2] submitted by Amicus Curiae Richard H. Frankel. [15-2364] (CC) [Entered: 07/13/2016 09:42 AM]
07/15/2016	7 pg, 313.55 KB	MOTION requesting leave for Attorney Theodore J. Boutrous Jr., Jason C. Schwartz, Joshua S. Lipshutz to enter an appearance filed by Appellant New Prime, Inc.. Certificate of service dated 07/15/2016. [15-2364] (TJB) [Entered: 07/15/2016 11:10 AM]
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07/18/2016	1 pg, 89.51 KB	NOTICE of appearance filed by Attorney Joshua S. Lipshutz for Appellant New Prime, Inc.. Certificate of service dated 07/15/2016. [15-2364] (CP) [Entered: 07/18/2016 02:38 PM]
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07/22/2016	40 pg, 164.68 KB	BRIEF tendered by Appellant New Prime, Inc.. Certificate of service dated 07/22/2016. [15-2364] (TJB) [Entered: 07/22/2016 12:17 PM]
07/26/2016	40 pg, 196.81	REPLY BRIEF filed by Appellant New Prime, Inc..

	KB	Certificate of service dated 07/22/2016. Nine paper copies identical to that of the electronically filed brief must be submitted so that they are received by the court on or before 08/02/2016. [15-2364] (GRC) [Entered: 07/26/2016 03:09 PM]
08/01/2016		NINE (9) paper copies of reply brief [6020268-2] submitted by Appellant New Prime, Inc.. [15-2364] (CC) [Entered: 08/02/2016 06:42 AM]
08/25/2016	2 pg, 81.5 KB	CASE calendared: Tuesday, 10/04/2016 AM Boston, MA Panel Courtroom. Designation form due 09/08/2016. [15-2364] (DT) [Entered: 08/25/2016 01:36 PM]
08/31/2016	1 pg, 39.01 KB	DESIGNATION of attorney presenting oral argument filed by Attorney Jennifer Bennett for Appellee Dominic Oliveira. Certificate of service dated 08/31/2016. [15-2364] (JB) [Entered: 08/31/2016 07:27 PM]
09/02/2016	1 pg, 475.11 KB	DESIGNATION of attorney presenting oral argument filed by Attorney Theodore J. Boutrous, Jr. for Appel-

		lant New Prime, Inc.. Certificate of service dated 09/02/2016. [15-2364] (TJB) [Entered: 09/02/2016 09:46 AM]
09/12/2016	12 pg, 266.97 KB	CITATION of supplemental authorities pursuant to Fed. R. App. P. 28(j) filed by Appellant New Prime, Inc.. Certificate of service dated 09/12/2016. [15-2364] (TJB) [Entered: 09/12/2016 07:45 PM]
09/20/2016	4 pg, 34.25 KB	RESPONSE to citation of supplemental authorities pursuant to Fed. R. App. P. 28(j) [6032127-2] filed by Appellee Dominic Oliveira. Certificate of service dated 09/20/2016. [15-2364] (JB) [Entered: 09/20/2016 02:46 PM]
10/04/2016		CASE argued. Panel: Rogeriee Thompson, Appellate Judge; William J. Kayatta , Jr., Appellate Judge and Paul J. Barbadoro, U.S. District Judge. Arguing attorneys: Theodore J. Boutrous, Jr. for New Prime, Inc. and Jennifer Bennett for Dominic Oliveira. [15-2364] (DT) [Entered: 10/04/2016 12:43

		PM]
11/16/2016	11 pg, 311.32 KB	CITATION of supplemental authorities pursuant to Fed. R. App. P. 28(j) filed by Appellant New Prime, Inc.. Certificate of service dated 11/16/2016. [15-2364] (TJB) [Entered: 11/16/2016 06:06 PM]
11/22/2016	4 pg, 35.08 KB	RESPONSE to citation of supplemental authorities pursuant to Fed. R. App. P. 28(j) [6048230-2] filed by Appellee Dominic Oliveira. Certificate of service dated 11/22/2016. [15-2364] (JB) [Entered: 11/22/2016 07:57 PM]
05/12/2017	44 pg, 83.15 KB	OPINION issued by Rogeriee Thompson, Appellate Judge; William J. Kayatta , Jr., Appellate Judge and Paul J. Barbadoro,* U.S. District Judge. Published. * Of the District of New Hampshire, sitting by designation. [15-2364]. CLERK'S NOTE: Docket entry was edited to modify the file date. (AL) [Entered: 05/15/2017 08:50 AM]
05/12/2017	1 pg, 6.98 KB	JUDGMENT. 15-2364 Affirmed [15-2364]. CLERK'S NOTE: Docket entry was

		edited to modify the file date. (AL) [Entered: 05/15/2017 08:54 AM]
05/30/2017	24 pg, 255.88 KB	PETITION for rehearing and rehearing en banc filed by Appellant New Prime, Inc.. Certificate of service dated 05/30/2017. [15-2364] (TJB) [Entered: 05/30/2017 01:06 PM]
06/06/2017	27 pg, 149.97 KB	MOTION for leave to file amicus curiae brief in support of Petitioner filed by Movant(s) American Trucking Associations, Inc.. Certificate of service dated 06/06/2017. [15-2364] (RP) [Entered: 06/06/2017 02:17 PM]
06/06/2017	25 pg, 235.91 KB	MOTION for leave to file amicus curiae brief in support of Appellant filed by Movant(s) The Chamber of Commerce of the United States of America. Certificate of service dated 06/06/2017. [15-2364] (AJP) [Entered: 06/06/2017 05:46 PM]
06/06/2017	2 pg, 12.65 KB	NOTICE of appearance on behalf of Movant(s) The Chamber of Commerce of the United States of America filed by Attorney An-

		drew J. Pincus. Certificate of service dated 06/06/2017. [15-2364] (AJP) [Entered: 06/06/2017 05:49 PM]
06/07/2017	1 pg, 5.69 KB	CORPORATE disclosure statement filed by Movant Chamber of Commerce of the United States of America. Certificate of service dated 06/06/2017. [15-2364] (CP) [Entered: 06/07/2017 12:47 PM]
06/07/2017	1 pg, 5.66 KB	CORPORATE disclosure statement filed by Movant American Trucking Associations, Inc.. Certificate of service dated 06/06/2017. [15-2364] (CP) [Entered: 06/07/2017 12:53 PM]
06/08/2017	2 pg, 83.33 KB	ORDER entered by Rogeriee Thompson, Appellate Judge granting motion for leave to file amicus curiae brief filed by Movant American Trucking Associations, Inc. [15-2364] (CP) [Entered: 06/08/2017 11:19 AM]
06/08/2017	22 pg, 113.71 KB	AMICUS CURIAE BRIEF filed by Movant American Trucking Associations, Inc. in support of Appellant. Certificate of service dated 06/06/2017. Nine paper cop-

		ies identical to that of the electronically filed brief must be submitted so that they are received by the court on or before 06/15/2017. [15-2364] (CP) [Entered: 06/08/2017 11:24 AM]
06/08/2017	2 pg, 83.44 KB	ORDER granting motion for leave to file amicus curiae brief filed by Movant Chamber of Commerce of the United States of America. [15-2364] (CP) [Entered: 06/08/2017 02:41 PM]
06/08/2017	20 pg, 143.98 KB	AMICUS CURIAE BRIEF filed by Amicus Curiae Chamber of Commerce of the United States of America. Certificate of service dated 06/06/2017. Nine paper copies identical to that of the electronically filed brief must be submitted so that they are received by the court on or before 06/15/2017. [15-2364] (CP) [Entered: 06/08/2017 02:45 PM]
06/12/2017		NINE (9) paper copies of amicus brief [6097988-2] submitted by Amicus Curiae American Trucking Associations, Inc.. [15-2364] (CC) [Entered: 06/12/2017

		10:24 AM]
06/15/2017		NINE (9) paper copies of amicus brief [6098188-2] submitted by Amicus Curiae Chamber of Commerce of the United States of America. [15-2364] (CC) [Entered: 06/15/2017 10:08 AM]
06/27/2017	2 pg, 46.1 KB	ORDER entered by Jeffrey R. Howard, Chief Appellate Judge; Juan R. Torruella, Appellate Judge; Sandra L. Lynch, Appellate Judge; Rogeriee Thompson, Appellate Judge; William J. Kayatta , Jr., Appellate Judge; David J. Barron, Appellate Judge and Paul J. Barbadoro,* U.S. District Judge denying petition for panel rehearing/rehearing en banc filed by Appellant New Prime, Inc. *Of the District of New Hampshire, sitting by designation. [15-2364] (CP) [Entered: 06/27/2017 01:23 PM]
07/06/2017	2 pg, 7.47 KB	MANDATE issued. [15-2364] (CC) [Entered: 07/06/2017 08:01 AM]
09/06/2017	1 pg, 40.44 KB	U.S. SUPREME COURT NOTICE advising a petition for a writ of certiorari

	was filed on 09/06/2017 and assigned case number 17-340. [15-2364] (CP) [Entered: 09/08/2017 11:48 AM]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS (BOSTON)
CIVIL DOCKET FOR
CASE #: 1:15-CV-10603-PBS

Oliveira v. New Prime, Inc.
Assigned to: Chief Judge Patti B. Saris
Case in other court: USCA – First Circuit, 15-02364
Supreme Court of the United States, 17-00340
Cause: 29:206 Collect Unpaid Wages

Date Filed: 03/04/2015
Date Terminated: 03/08/2018
Jury Demand: Plaintiff
Nature of Suit: 710 Labor: Fair Standards
Jurisdiction: Federal Question

Plaintiff

Dominic Oliveira
On his behalf and on behalf of all others similarly situated

represented by

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617-953-7912
Email: adam@abzlaw.com
TERMINATED: 08/28/2015

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Date Filed	#	Docket Text
03/04/2015	1	COMPLAINT against New Prime, Inc., filed by Dominic Oliveira. (Attachments: # 1 Civil Cover Sheet, # 2 Exhibit 1)(Maynard, Timothy) (Entered: 03/04/2015)
03/04/2015	2	ELECTRONIC NOTICE of Case Assignment. Chief Judge Patti B. Saris assigned to case. If the trial Judge issues an Order of Reference of any matter in this case to a Magistrate Judge, the matter will be transmitted to Magistrate Judge Donald L. Cabell. (Abaid, Kimberly) (Entered: 03/04/2015)
03/04/2015	3	Filing fee/payment: $ 400.00, receipt number 1BST048337 for 1 Complaint (Caruso, Stephanie) (Entered: 03/05/2015)
03/04/2015	4	MOTION for Admission as to Hillary S. Cheng by Dominic Oliveira.(Geraldino-Karasek, Clarilde) (Entered: 03/09/2015)
03/13/2015	5	NOTICE of Appearance by Adam B. Zimmerman on behalf of Dominic Oliveira (Zimmerman, Adam) (Entered: 03/13/2015)
03/16/2015	6	Summons Issued as to All Defendants. **Counsel receiving this notice electronically**

Date Filed	#	Docket Text
		should download this summons, complete one for each defendant and serve it in accordance with Fed.R.Civ.P. 4 and LR 4.1. Summons will be mailed to plaintiff(s) not receiving notice electronically for completion of service. (Geraldino-Karasek, Clarilde) (Entered: 03/16/2015)
03/31/2015	7	MOTION for Leave to Appear Pro Hac Vice for admission of Andrew Schmidt Filing fee: $100, receipt number 0101–5488836 by Dominic Oliveira. (Attachments: # 1 Affidavit of Pro Hac Vice applicant Andrew Schmidt) (Zimmerman, Adam) (Entered: 03/31/2015)
04/03/2015	8	Chief Judge Patti B. Saris: ELECTRONIC ORDER entered ALLOWED 7 Motion for Leave to Appear Pro Hac Vice Added Andrew Schmidt. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov.** Se-

Date Filed	#	Docket Text
		lect Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form. (Geraldino-Karasek, Clarilde) (Entered: 04/03/2015)
04/27/2015	9	MOTION to Withdraw of Hillary S. Cheng as Attorney by Dominic Oliveira.(Schmidt, Andrew) Modified docket text in accordance with motion filed on 4/28/2015 (Geraldino-Karasek, Clarilde). (Entered: 04/27/2015)
04/28/2015	10	Chief Judge Patti B. Saris: ELECTRONIC ORDER entered ALLOWED 9 Motion to Withdraw as Attorney Hillary S. Cheng. (Geraldino-Karasek, Clarilde) (Entered: 04/28/2015)
04/28/2015	11	Chief Judge Patti B. Saris: ELECTRONIC ORDER entered finding as moot 4 Motion for Limited Admission (Geraldino-Karasek, Clarilde) (Entered: 04/28/2015)
05/08/2015	12	Joint MOTION for Extension of Time to 06/08/2015 to Defendant to File its Answer or Otherwise Plead to Plaintiff's Complaint by New Prime, Inc.. (Attachments: # 1 Text of Proposed Order Pro-

Date Filed	#	Docket Text
		posed Order on Joint Motion for Extension of Time for Defenant to File Its Answer or Otherwise Plead to Plaintiff's Complaint) (Leggett, Judith) (Entered: 05/08/2015)
05/08/2015	13	CERTIFICATE OF CONSULTATION pursuant to LR 7.1 re 12 Joint MOTION for Extension of Time to 06/08/2015 to Defendant to File its Answer or Otherwise Plead to Plaintiff's Complaint by Judith A. Leggett on behalf of New Prime, Inc.. (Leggett, Judith) (Entered: 05/08/2015)
05/08/2015	14	CORPORATE DISCLOSURE STATEMENT by New Prime, Inc.. (Leggett, Judith) (Entered: 05/08/2015)
05/11/2015	15	Chief Judge Patti B. Saris: ELECTRONIC ORDER entered ALLOWED 12 Joint MOTION for Extension of Time. Answer due by 06/08/2015 (Geraldino-Karasek, Clarilde) (Entered: 05/11/2015)
06/04/2015	16	Joint MOTION for Extension of Time to 06/15/2015 to Defendant to Respond to Complaint by New Prime, Inc.. (Attachments: # 1

Date Filed	#	Docket Text
		Exhibit A. L.R. 7.1 Cert, # 2 Text of Proposed Order Proposed Order on Joint Motion To Extend Time for Defendant to Respond to Complaint)(Leggett, Judith) (Entered: 06/04/2015)
06/04/2015	17	CERTIFICATE OF CONSULTATION pursuant to LR 7.1 re 16 Joint MOTION for Extension of Time to 06/15/2015 to Defendant to Respond to Complaint by Judith A. Leggett on behalf of New Prime, Inc.. (Leggett, Judith) (Entered: 06/04/2015)
06/05/2015	18	Chief Judge Patti B. Saris: ELECTRONIC ORDER entered ALLOWED 16 Motion for Extension of Time (Geraldino-Karasek, Clarilde) (Entered: 06/05/2015)
06/11/2015	19	Assented to MOTION for Leave to Appear Pro Hac Vice for admission of Robert J. Hingula Filing fee: $ 100, receipt number 0101–5605919 by New Prime, Inc.. (Attachments: # 1 Affidavit Certificate (Affidavit) of Robert Hingula of Good Standing, # 2 Exhibit State of Missouri Certificate of Good Standing for Robert Hingula)(Leggett, Judith) (En-

Date Filed	#	Docket Text
		tered: 06/11/2015)
06/11/2015	20	CERTIFICATE OF CONSULTATION pursuant to LR 7.1 *for Motion for Pro Hac Vice Admission of Robert Hingula* by Judith A. Leggett on behalf of New Prime, Inc.. (Leggett, Judith) (Entered: 06/11/2015)
06/11/2015	21	Assented to MOTION for Leave to Appear Pro Hac Vice for admission of James Sullivan Filing fee: $ 100, receipt number 0101–5605921 by New Prime, Inc.. (Attachments: # 1 Affidavit Certificate (Affidavit) of Good Standing of James Sullivan, # 2 Exhibit State of Missouri Certificate of Good Standing for James Sullivan)(Leggett, Judith) (Entered: 06/11/2015)
06/11/2015	22	CERTIFICATE OF CONSULTATION pursuant to LR 7.1 *for Motion for Pro Hac Vice Admission of James Sullivan for Defendant* by Judith A. Leggett on behalf of New Prime, Inc.. (Leggett, Judith) (Entered: 06/11/2015)
06/11/2015	23	Certificate of Good Standing *of Robert Hingula for Pro Hac Vice Admission for Defendant* by New

Date Filed	#	Docket Text
		Prime, Inc.. (Leggett, Judith) (Entered: 06/11/2015)
06/15/2015	24	MOTION Compel Arbitration and Stay Proceedings and/or Dismiss Case for Improper Venue or, in the Alternative, to Dismiss for Failure to State A Claim by New Prime, Inc..(Leggett, Judith) (Entered: 06/15/2015)
06/15/2015	25	MEMORANDUM in Support re 24 MOTION Compel Arbitration and Stay Proceedings and/or Dismiss Case for Improper Venue or, in the Alternative, to Dismiss for Failure to State A Claim filed by New Prime, Inc.. (Attachments: # 1 Exhibit A, 5/31/13 Independant Operating Agreement, # 2 Exhibit B, 3/12/14 Independant Operating Agreement, # 3 Exhibit C, Missouri Secretary of State Filing)(Leggett, Judith) (Entered: 06/15/2015)
06/15/2015	26	CERTIFICATE OF CONSULTATION pursuant to LR 7.1 *regarding Defendants Motion to Compel Arbitration and Stay Proceedings and/or Dismiss Case for Improper Venue or, in the Alternative, to Dismiss for Failure to State A Claim* by Ju-

Date Filed	#	Docket Text
		dith A. Leggett on behalf of New Prime, Inc.. (Leggett, Judith) (Entered: 06/15/2015)
06/16/2015	27	Chief Judge Patti B. Saris: ELECTRONIC ORDER entered granting 19 Motion for Leave to Appear Pro Hac Vice Added Robert J. Hingula. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Geraldino-Karasek, Clarilde) (Entered: 06/16/2015)
06/16/2015	28	Chief Judge Patti B. Saris: ELECTRONIC ORDER entered granting 21 Motion for Leave to Appear Pro Hac Vice Added James C. Sullivan. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the**

Date Filed	#	Docket Text
		Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form. (Geraldino-Karasek, Clarilde) (Entered: 06/16/2015)
06/16/2015	29	EXHIBIT *A, 5–31–13 Independant Operating Agreement (refiled to include signature page omitted from prior exhibit filed)* by New Prime, Inc.. (Leggett, Judith) (Entered: 06/16/2015)
06/18/2015	30	NOTICE of Appearance by Robert J. Hingula on behalf of New Prime, Inc. (Hingula, Robert) (Entered: 06/18/2015)
06/29/2015	31	Assented–to MOTION for Extension of Time to 7/20/2015 to File Response/Reply as to 24 MOTION Compel Arbitration and Stay Proceedings and/or Dismiss Case for Improper Venue or, in the Alternative, to Dismiss for Failure to State A Claim by Dominic Oliveira. (Attachments: # 1 Exhibit A)(Schmidt, Andrew) Modified docket text on 6/30/2015 to add " Assented–to "(Geraldino-Karasek, Clarilde). (Entered:

Date Filed	#	Docket Text
		06/29/2015)
07/02/2015	32	Chief Judge Patti B. Saris: ELECTRONIC ORDER entered ALLOWED 31 Motion for Extension of Time to File Response/Reply re 24 MOTION Compel Arbitration and Stay Proceedings and/or Dismiss Case for Improper Venue or, in the Alternative, to Dismiss for Failure to State A Claim Responses due by 7/20/2015 (Geraldino-Karasek, Clarilde) (Entered: 07/02/2015)
07/06/2015	33	AMENDED COMPLAINT *First* against Dominic Oliveira, filed by Dominic Oliveira. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11)(Schmidt, Andrew) (Entered: 07/06/2015)
07/09/2015	34	Joint MOTION to Withdraw 24 MOTION Compel Arbitration and Stay Proceedings and/or Dismiss Case for Improper Venue or, in the Alternative, to Dismiss for Failure to State A Claim by Dominic Oliveira. (Attachments: # 1 Exhibit A)(Schmidt, Andrew)

Date Filed	#	Docket Text
		(Entered: 07/09/2015)
07/16/2015	38	Chief Judge Patti B. Saris: ELECTRONIC ORDER entered granting 34 Joint MOTION to Withdraw 24 MOTION Compel Arbitration and Stay Proceedings and/or Dismiss Case for Improper Venue or, in the Alternative, to Dismiss for Failure to State A Claim (Geraldino-Karasek, Clarilde) (Entered: 07/20/2015)
07/16/2015	39	WITHDRAWAL of motion: 24 MOTION Compel Arbitration and Stay Proceedings and/or Dismiss Case for Improper Venue or, in the Alternative, to Dismiss for Failure to State A Claim filed by New Prime, Inc.. (Geraldino-Karasek, Clarilde) (Entered: 07/20/2015)
07/20/2015	35	MOTION to Compel *Arbitration and Stay Proceedings and/or Dismiss Amended Complaint for Improper Venue or, in the Alternative, to Dismiss Count III for Failure to State a Claim* by New Prime, Inc..(Hingula, Robert) (Entered: 07/20/2015)
07/20/2015	36	MEMORANDUM in Support re 35 MOTION to Compel *Arbitration and Stay Proceedings*

Date Filed	#	Docket Text
		and/or Dismiss Amended Complaint for Improper Venue or, in the Alternative, to Dismiss Count III for Failure to State a Claim filed by New Prime, Inc.. (Attachments: # 1 Exhibit A – May 2013 Independent Contractor Operating Agreement, # 2 Exhibit B – March 2014 Independent Contractor Operating Agreement, # 3 Exhibit C – Missouri Secretary of State Filing) (Hingula, Robert) (Entered: 07/20/2015)
07/20/2015	37	CERTIFICATE OF CONSULTATION pursuant to LR 7.1 re 35 MOTION to Compel *Arbitration and Stay Proceedings and/or Dismiss Amended Complaint for Improper Venue or, in the Alternative, to Dismiss Count III for Failure to State a Claim* by Robert J. Hingula on behalf of New Prime, Inc. filed by on behalf of New Prime, Inc.. (Hingula, Robert) (Entered: 07/20/2015)
08/03/2015	40	MEMORANDUM in Opposition re 35 MOTION to Compel *Arbitration and Stay Proceedings and/or Dismiss Amended Complaint for Improper Venue or, in the Alternative, to Dismiss Count III for Failure to State a Claim*

Date Filed	#	Docket Text
		filed by Dominic Oliveira. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(Schmidt, Andrew) (Entered: 08/03/2015)
08/05/2015	41	NOTICE of Appearance by Hillary A. Schwab on behalf of Dominic Oliveira (Schwab, Hillary) (Entered: 08/05/2015)
08/05/2015	42	NOTICE of Appearance by Brant Casavant on behalf of Dominic Oliveira (Casavant, Brant) (Entered: 08/05/2015)
08/06/2015	43	ELECTRONIC NOTICE Setting Hearing on Motion 35 MOTION to Compel *Arbitration and Stay Proceedings and/or Dismiss Amended Complaint for Improper Venue or, in the Alternative, to Dismiss Count III for Failure to State a Claim* : Motion Hearing set for 9/15/2015 03:00 PM in Courtroom 19 before Chief Judge Patti B. Saris. (Molloy, Maryellen) (Entered: 08/06/2015)
08/11/2015	44	MOTION to Withdraw as Attorney by Dominic Oliveira. (Attachments: # 1 Exhibit)(Schmidt, Andrew) (Entered: 08/11/2015)
08/11/2015	45	MOTION to Withdraw as Attorney by Dominic Oliveira. (Attachments: # 1 Exhibit)(Schmidt,

Date Filed	#	Docket Text
		Andrew) (Entered: 08/11/2015)
08/12/2015	46	NOTICE: If parties request a continuance of a Motion hearing scheduled for 9/15/15 a Joint Motion to continue must be filed. Counsel may propose a few dates that both sides are available. (Molloy, Maryellen) (Entered: 08/12/2015)
08/13/2015	47	Joint MOTION to Continue Hearing on Motion to Compel Arbitration to September 21, 22 or 28, 2015 by New Prime, Inc..(Hingula, Robert) (Entered: 08/13/2015)
08/17/2015	48	MOTION for Leave to File *(Unopposed) Reply in Support of Motion to Compel Arbitration and Stay Proceedings and/or Dismiss Amended Complaint for Improper Venue or, in the Alternative, to Dismiss Count III for Failure to State a Claim* by New Prime, Inc.. (Attachments: # 1 Exhibit A – proposed Reply in Support of Motion to Compel Arbitration) (Hingula, Robert) (Entered: 08/17/2015)
08/17/2015	49	CERTIFICATE OF CONSULTATION pursuant to LR 7.1 re 48 MOTION for Leave

Date Filed	#	Docket Text
		to File *(Unopposed) Reply in Support of Motion to Compel Arbitration and Stay Proceedings and/or Dismiss Amended Complaint for Improper Venue or, in the Alternative, to Dismiss Count III for Failure to State a Claim* by Robert J. Hingula on behalf of New Prime, Inc. filed by on behalf of New Prime, Inc.. (Hingula, Robert) (Entered: 08/17/2015)
08/17/2015	50	Chief Judge Patti B. Saris: ELECTRONIC ORDER entered granting 48 Motion for Leave to File Document ; Counsel using the Electronic Case Filing System should now file the document for which leave to file has been granted in accordance with the CM/ECF Administrative Procedures. Counsel must include – Leave to file granted on (date of order)– in the caption of the document. (Molloy, Maryellen) (Entered: 08/17/2015)
08/17/2015	51	REPLY to Response to 35 MOTION to Compel *Arbitration and Stay Proceedings and/or Dismiss Amended Complaint for Improper Venue or, in the Alternative, to Dismiss Count III for Failure to State a Claim* filed by

Date Filed	#	Docket Text
		New Prime, Inc.. (Attachments: # 1 Exhibit 1 – Hallmark Trucking LLC Articles of Organization) (Hingula, Robert) (Entered: 08/17/2015)
08/28/2015	52	Chief Judge Patti B. Saris: ELECTRONIC ORDER entered ALLOWED 47 Motion to Continue Hearing on Motion to Compel Arbitration (Geraldino-Karasek, Clarilde) (Entered: 08/28/2015)
08/28/2015	53	Chief Judge Patti B. Saris: ELECTRONIC ORDER entered granting 44 Motion to Withdraw as Attorney. Attorney Adam B. Zimmerman terminated; granting 45 Motion to Withdraw as Attorney. Attorney Adam B. Zimmerman terminated (Geraldino-Karasek, Clarilde) (Entered: 08/28/2015)
09/10/2015	54	ELECTRONIC NOTICE Resetting Hearing on Motion 35 MOTION to Compel *Arbitration and Stay Proceedings and/or Dismiss Amended Complaint for Improper Venue or, in the Alternative, to Dismiss Count III for Failure to State a Claim* : Motion Hearing set for 9/22/2015 09:00 AM in Courtroom 19 before Chief

Date Filed	#	Docket Text
		Judge Patti B. Saris. (Geraldino-Karasek, Clarilde) (Entered: 09/10/2015)
09/16/2015	55	ELECTRONIC NOTICE Resetting **** TIME ONLY **** Hearing on Motion 35 MOTION to Compel *Arbitration and Stay Proceedings and/or Dismiss Amended Complaint for Improper Venue or, in the Alternative, to Dismiss Count III for Failure to State a Claim* : Motion Hearing RESET from 9:00AM to 11:00AM on 9/22/2015 in Courtroom 19 before Chief Judge Patti B. Saris. (Geraldino-Karasek, Clarilde) (Entered: 09/16/2015)
09/22/2015	56	ELECTRONIC Clerk's Notes for proceedings held before Chief Judge Patti B. Saris: Motion Hearing held on 9/22/2015 re 35 MOTION to Compel *Arbitration and Stay Proceedings and/or Dismiss Amended Complaint for Improper Venue or, in the Alternative, to Dismiss Count III for Failure to State a Claim* filed by New Prime, Inc...any supplemental briefs to be file by 10/7/15 no more than 5 pages, all matter's taken under advisement. (Court Reporter: Lee Marzilli at

Date Filed	#	Docket Text
		leemarz@aol.com.) (Molloy, Maryellen) Modified on 9/23/2015 (Molloy, Maryellen). (Entered: 09/22/2015)
10/07/2015	57	Supplemental SUR–REPLY to Motion re 35 MOTION to Compel *Arbitration and Stay Proceedings and/or Dismiss Amended Complaint for Improper Venue or, in the Alternative, to Dismiss Count III for Failure to State a Claim* filed by Dominic Oliveira. (Schmidt, Andrew) (Entered: 10/07/2015)
10/07/2015	58	Supplemental SUR–REPLY to Motion re 35 MOTION to Compel *Arbitration and Stay Proceedings and/or Dismiss Amended Complaint for Improper Venue or, in the Alternative, to Dismiss Count III for Failure to State a Claim* filed by New Prime, Inc.. (Hingula, Robert) (Entered: 10/07/2015)
10/14/2015	59	NOTICE by Dominic Oliveira *of Tolling Agreement* (Schwab, Hillary) (Entered: 10/14/2015)
10/27/2015	60	Chief Judge Patti B. Saris: MEMORANDUM and ORDER entered. The defendant's motion to compel arbitration and stay proceedings, and/or dismiss the

Date Filed	#	Docket Text
		case for improper venue, or, in the alternative, to dismiss Count III for failure to state a claim (Docket No. 35) is DENIED without prejudice. The parties may conduct factual discovery on the threshold question of the plaintiff's status as an employee or independent contractor until January 8, 2016. Any motions for summary judgment shall be filed by January 22, 2016. (Geraldino-Karasek, Clarilde) (Entered: 10/27/2015)
10/27/2015	61	SET DEADLINES : Factual discovery on the threshold question of the plaintiff's status as an employee or independent contractor due by 1/8/2016. Motions for Summary Judgment due by 1/22/2016. (Geraldino-Karasek, Clarilde) (Entered: 10/27/2015)
11/12/2015	62	NOTICE OF APPEAL as to 60 Order on Motion to Compel,, by New Prime, Inc. Filing fee: $ 505, receipt number 0101–5840708 Fee Status: Not Exempt. NOTICE TO COUNSEL: A Transcript Report/Order Form, which can be downloaded from the First Circuit Court of Appeals web site at http://www.ca1.uscourts.gov

Date Filed	#	Docket Text
		MUST be completed and submitted to the Court of Appeals. **Counsel shall register for a First Circuit CM/ECF Appellate Filer Account at http://pacer.psc.uscourts.gov/cmecf. Counsel shall also review the First Circuit requirements for electronic filing by visiting the CM/ECF Information section at http://www.ca1.uscourts.gov/cmecf. US District Court Clerk to deliver official record to Court of Appeals by 12/2/2015. (Hingula, Robert) (Entered: 11/12/2015)**
11/12/2015	63	MOTION to Stay *Litigation Pending Appeal* by New Prime, Inc..(Hingula, Robert) (Entered: 11/12/2015)
11/12/2015	64	MEMORANDUM in Support re 63 MOTION to Stay *Litigation Pending Appeal* filed by New Prime, Inc.. (Hingula, Robert) (Entered: 11/12/2015)
11/12/2015	65	CERTIFICATE OF CONSULTATION pursuant to LR 7.1 re 64 Memorandum in Support of Motion, 63 MOTION to Stay *Litigation Pending Ap-*

Date Filed	#	Docket Text
		peal by Robert J. Hingula on behalf of New Prime, Inc. filed by on behalf of New Prime, Inc.. (Hingula, Robert) (Entered: 11/12/2015)
11/13/2015	66	Certified and Transmitted Abbreviated Electronic Record on Appeal to US Court of Appeals re 62 Notice of Appeal. (Paine, Matthew) (Entered: 11/13/2015)
11/16/2015	67	USCA Case Number 15–2364 for 62 Notice of Appeal filed by New Prime, Inc.. (Paine, Matthew) (Entered: 11/16/2015)
11/17/2015	68	Joint MOTION to Stay *of Discovery Pending Motion to Stay and Continuance of Deadlines* by New Prime, Inc..(Hingula, Robert) (Entered: 11/17/2015)
11/25/2015	69	Opposition re 63 MOTION to Stay *Litigation Pending Appeal* filed by Dominic Oliveira. (Schwab, Hillary) (Entered: 11/25/2015)
12/01/2015	70	Chief Judge Patti B. Saris: ENDORSED ORDER entered " ALLOWED pending a determination by the First Circuit as to whether the District Court should determine the therehold issue of arbitrability " re 63 Mo-

Date Filed	#	Docket Text
		tion to Stay (Geraldino-Karasek, Clarilde) (Entered: 12/01/2015)
12/02/2015	71	Supplemental Record on Appeal transmitted to US Court of Appeals re 62 Notice of Appeal Documents included: ECF nos. 63,64,65,69,70 (Paine, Matthew) (Entered: 12/02/2015)
12/31/2015	72	Chief Judge Patti B. Saris: ELECTRONIC ORDER entered finding as moot 68 oint MOTION to Stay of Discovery Pending Motion to Stay and Continuance of Deadlines. Pursuant to Order 70 entered. (Geraldino-Karasek, Clarilde) (Entered: 12/31/2015)
05/12/2017	73	OPINION of USCA as to 62 Notice of Appeal filed by New Prime, Inc.. (Paine, Matthew) (Entered: 05/16/2017)
05/12/2017	74	USCA Judgment as to 62 Notice of Appeal filed by New Prime, Inc. AFFIRMED (Paine, Matthew) (Entered: 05/16/2017)
05/22/2017	75	NOTICE of Appearance by Joshua S. Lipshutz on behalf of New Prime, Inc. (Lipshutz, Joshua) (Entered: 05/22/2017)

Date Filed	#	Docket Text
07/06/2017	76	MANDATE of USCA as to 62 Notice of Appeal filed by New Prime, Inc., Appeal 62 Terminated (Paine, Matthew) (Entered: 07/07/2017)
07/13/2017	77	NOTICE of Withdrawal of Appearance by James C. Sullivan (Sullivan, James) (Entered: 07/13/2017)
07/13/2017	78	NOTICE of Withdrawal of Appearance by Judith A. Leggett (Leggett, Judith) (Entered: 07/13/2017)
07/27/2017	79	MOTION for Initial Scheduling Conference by Dominic Oliveira.(Schwab, Hillary) (Entered: 07/27/2017)
07/27/2017	80	NOTICE of Withdrawal of Appearance by Robert J. Hingula (Hingula, Robert) (Entered: 07/27/2017)
08/02/2017	81	Opposition re 79 MOTION for Initial Scheduling Conference filed by New Prime, Inc.. (Lipshutz, Joshua) (Entered: 08/02/2017)
08/02/2017	82	MOTION to Stay *(to Extend Stay)* by New Prime, Inc..(Lipshutz, Joshua) (Entered: 08/02/2017)

Date Filed	#	Docket Text
08/02/2017	83	MEMORANDUM in Support re 82 MOTION to Stay *(to Extend Stay)* filed by New Prime, Inc.. (Lipshutz, Joshua) (Entered: 08/02/2017)
08/02/2017	84	CERTIFICATE OF CONSULTATION pursuant to LR 7.1 re 82 MOTION to Stay *(to Extend Stay)* by Joshua S. Lipshutz on behalf of New Prime, Inc.. (Lipshutz, Joshua) (Entered: 08/02/2017)
08/03/2017	85	ELECTRONIC NOTICE Setting Hearing on Motion : 82 MOTION to Extend Stay : Motion Hearing set for 8/16/2017 10:00 AM in Courtroom 19 before Chief Judge Patti B. Saris. (Geraldino-Karasek, Clarilde) (Entered: 08/03/2017)
08/03/2017	86	NOTICE of Scheduling Conference: SCHEDULING CONFERENCE SET FOR 8/16/2017 10:30 AM in Courtroom 19 before Chief Judge Patti B. Saris. (Geraldino-Karasek, Clarilde) (Entered: 08/03/2017)
08/10/2017	87	Assented to MOTION for Leave to Appear Pro Hac Vice for admission of Amanda C. Machin

Date Filed	#	Docket Text
		Filing fee: $ 100, receipt number 0101–6747729 by New Prime, Inc.. (Attachments: # 1 Affidavit of Amanda C. Machin)(Lipshutz, Joshua) (Entered: 08/10/2017)
08/10/2017	88	CERTIFICATE OF CONSULTATION pursuant to LR 7.1 re 87 Assented to MOTION for Leave to Appear Pro Hac Vice for admission of Amanda C. Machin Filing fee: $ 100, receipt number 0101–6747729 by Joshua S. Lipshutz on behalf of New Prime, Inc.. (Lipshutz, Joshua) (Entered: 08/10/2017)
08/10/2017	89	Assented to MOTION for Leave to Appear Pro Hac Vice for admission of Jason R. Meltzer Filing fee: $ 100, receipt number 0101–6749374 by New Prime, Inc.. (Attachments: # 1 Affidavit of Jason R. Meltzer) (Lipshutz, Joshua) (Entered: 08/10/2017)
08/10/2017	90	CERTIFICATE OF CONSULTATION pursuant to LR 7.1 re 89 Assented to MOTION for Leave to Appear Pro Hac Vice for admission of Jason R. Meltzer Filing fee: $ 100, receipt number 0101–6749374 by

Date Filed	#	Docket Text
		Joshua S. Lipshutz on behalf of New Prime, Inc.. (Lipshutz, Joshua) (Entered: 08/10/2017)
08/11/2017	91	Chief Judge Patti B. Saris: ELECTRONIC ORDER entered granting 87 Motion for Leave to Appear Pro Hac Vice Added Amanda C. Machin. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Geraldino-Karasek, Clarilde) (Entered: 08/11/2017)
08/11/2017	92	Chief Judge Patti B. Saris: ELECTRONIC ORDER entered granting 89 Motion for Leave to Appear Pro Hac Vice Added Jason R. Meltzer. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the**

Date Filed	#	Docket Text
		Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form. (Geraldino-Karasek, Clarilde) (Entered: 08/11/2017)
08/12/2017	93	MOTION for Leave to Appear Pro Hac Vice for admission of Theodore J. Boutrous Filing fee: $ 100, receipt number 0101–6751156 by New Prime, Inc.. (Attachments: # 1 Affidavit Theodore J. Boutrous, Jr., # 2 Exhibit Theodore J. Boutrous, Jr. Bar Memberships)(Lipshutz, Joshua) (Entered: 08/12/2017)
08/12/2017	94	CERTIFICATE OF CONSULTATION pursuant to LR 7.1 re 93 MOTION for Leave to Appear Pro Hac Vice for admission of Theodore J. Boutrous Filing fee: $ 100, receipt number 0101–6751156 by Joshua S. Lipshutz on behalf of New Prime, Inc.. (Lipshutz, Joshua) (Entered: 08/12/2017)
08/14/2017	95	MOTION for Leave to Appear Pro Hac Vice for admission of Jason C. Schwartz Filing fee: $ 100,

Date Filed	#	Docket Text
		receipt number 0101–6752609 by New Prime, Inc.. (Attachments: # 1 Affidavit Jason C. Schwartz, # 2 Exhibit Jason C. Schwartz, Jurisdictions/Admissions to Practice) (Lipshutz, Joshua) (Entered: 08/14/2017)
08/14/2017	96	Chief Judge Patti B. Saris: ELECTRONIC ORDER entered granting 93 Motion for Leave to Appear Pro Hac Vice Added Theodore J. Boutrous. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Geraldino-Karasek, Clarilde) (Entered: 08/14/2017)
08/14/2017	97	CERTIFICATE OF CONSULTATION pursuant to LR 7.1 re 95 MOTION for Leave to Appear Pro Hac Vice for admission of Jason C. Schwartz Filing fee: $ 100, receipt number

Date Filed	#	Docket Text
		0101–6752609 by Joshua S. Lipshutz on behalf of New Prime, Inc.. (Lipshutz, Joshua) (Entered: 08/14/2017)
08/14/2017	98	Opposition re 82 MOTION to Stay *(to Extend Stay)* filed by Dominic Oliveira. (Schmidt, Andrew) (Entered: 08/14/2017)
08/15/2017	99	Chief Judge Patti B. Saris: ELECTRONIC ORDER entered granting 95 Motion for Leave to Appear Pro Hac Vice Added Jason C. Schwartz. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Geraldino-Karasek, Clarilde) (Entered: 08/15/2017)
08/15/2017	100	JOINT STATEMENT re scheduling conference . (Schwab, Hillary) (Entered: 08/15/2017)
08/15/2017	101	CERTIFICATION pursuant to Local Rule 16.1 . (Schmidt, An-

Date Filed	#	Docket Text
		drew) (Entered: 08/15/2017)
08/15/2017	102	CERTIFICATION pursuant to Local Rule 16.1 . (Lipshutz, Joshua) (Entered: 08/15/2017)
08/16/2017	103	Chief Judge Patti B. Saris: ENDORSED ORDER entered " Denied. However, discovery will be limited " re 82 Motion to Stay (Geraldino-Karasek, Clarilde) (Entered: 08/16/2017)
08/16/2017	104	Chief Judge Patti B. Saris: ELECTRONIC ORDER entered. ORDER LIFTING STAY (Geraldino-Karasek, Clarilde) (Entered: 08/16/2017)
08/16/2017	105	Electronic Clerk's Notes for proceedings held before Chief Judge Patti B. Saris: Scheduling Conference held on 8/16/2017. Joint Statement – not adopted. Deadlines modified as stated in open court, parties will file an Amended Joint Statement on or before 8/23/17. Motion to Stay is Denied for now. Further Status Conference set for 2/27/18 at 2:30pm. (Court Reporter: Lee Marzilli at leemarz@aol.com.) (Molloy, Maryellen) Modified docket text on 8/18/2017 (Geraldino-Karasek, Clarilde). (Entered: 08/17/2017)

Date Filed	#	Docket Text
08/17/2017	106	Transcript of Motion Hearing/Scheduling Conference held on August 16, 2017, before Chief Judge Patti B. Saris. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Lee Marzilli at leemarz@aol.com Redaction Request due 9/7/2017. Redacted Transcript Deadline set for 9/18/2017. Release of Transcript Restriction set for 11/15/2017. (Scalfani, Deborah) (Entered: 08/17/2017)
08/17/2017	107	NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above-captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general-info.htm (Scalfani, Deborah) (Entered: 08/17/2017)
08/18/2017	108	NOTICE Resetting a Hearing: STATUS CONFERENCE SET FOR 2/27/2018 02:30 PM in

Date Filed	#	Docket Text
		Courtroom 19 before Chief Judge Patti B. Saris. (Geraldino-Karasek, Clarilde) (Entered: 08/18/2017)
08/23/2017	109	Amended JOINT STATEMENT re scheduling conference . (Machin, Amanda) (Entered: 08/23/2017)
09/06/2017	110	Case Appealed to Supreme Court of the United States, Case Number 17–340. (Paine, Matthew) (Entered: 09/11/2017)
09/12/2017	111	Assented to MOTION to Modify Proposed Schedule *in Joint Statement* by New Prime, Inc..(Machin, Amanda) (Entered: 09/12/2017)
09/12/2017	112	CERTIFICATE OF CONSULTATION pursuant to LR 7.1 re 111 Assented to MOTION to Modify Proposed Schedule *in Joint Statement* by Amanda C. Machin on behalf of New Prime, Inc.. (Machin, Amanda) (Entered: 09/12/2017)
09/13/2017	113	Chief Judge Patti B. Saris: ENDORSED ORDER entered ALLOWED 111 Assented to MOTION to Modify Proposed Schedule (Geraldino-Karasek, Clarilde) (Entered: 09/13/2017)

Date Filed	#	Docket Text
09/13/2017	114	RESET SCHEDULING ORDER DEADLINES pursuant to Order 113 entered: Motions due by 1/23/2018; Opposition due by 2/6/2018; Replies due by 2/13/2018. (Geraldino-Karasek, Clarilde) (Entered: 09/13/2017)
09/21/2017	115	STIPULATION *re Proposed Protective Order* by New Prime, Inc.. (Machin, Amanda) (Entered: 09/21/2017)
09/22/2017	116	Chief Judge Patti B. Saris: ORDER entered. PROTECTIVE ORDER (Geraldino-Karasek, Clarilde) (Entered: 09/25/2017)
09/26/2017	117	ANSWER to Complaint *(Amended Complaint, Dkt. 33)* by New Prime, Inc..(Machin, Amanda) (Entered: 09/26/2017)
01/23/2018	118	MOTION with INCORPORATED MEMORANDUM to Deny Class Certification by New Prime, Inc..(Lipshutz, Joshua) Modified docket text on 1/24/2018 (Geraldino-Karasek, Clarilde). (Entered: 01/23/2018)
01/23/2018	119	AFFIDAVIT in Support re 118 MOTION for Order to Deny Class Certification . (Attach-

Date Filed	#	Docket Text
		ments: # 1 Exhibit 1)(Lipshutz, Joshua) (Entered: 01/23/2018)
01/23/2018	120	AFFIDAVIT in Support re 118 MOTION for Order to Deny Class Certification . (Lipshutz, Joshua) (Entered: 01/23/2018)
02/01/2018	121	Joint MOTION for Extension of Time to February 20, 2018 to File Response/Reply as to 118 MOTION for Order to Deny Class Certification by Dominic Oliveira.(Schmidt, Andrew) (Entered: 02/01/2018)
02/05/2018	122	Chief Judge Patti B. Saris: ELECTRONIC ORDER entered ALLOWED re 121 Motion for Extension of Time to File Response/Reply re 118 MOTION for Order to Deny Class Certification Responses due by 2/20/2018; Replies due by 3/13/2018. (Geraldino-Karasek, Clarilde) (Entered: 02/05/2018)
02/16/2018	123	Joint MOTION for Extension of Time *as to Discovery and Summary Judgment Deadlines* by Dominic Oliveira.(Schwab, Hillary) (Entered: 02/16/2018)
02/16/2018	124	ELECTRONIC NOTICE OF RESCHEDULING.... Status Conference RESET FROM 2/27/18

Date Filed	#	Docket Text
		TO 3/19/2018 11:15 AM in Courtroom 19 before Chief Judge Patti B. Saris. (Molloy, Maryellen) (Entered: 02/16/2018)
02/20/2018	125	Opposition re 118 MOTION for Order to Deny Class Certification filed by Dominic Oliveira. (Schmidt, Andrew) (Entered: 02/20/2018)
02/20/2018	126	Chief Judge Patti B. Saris: ENDORSED ORDER entered " Allowed. However, the status conference is cancelled "re 123 Motion for Extension of Time as to Discovery and Summary Judgment Deadlines. (Coppola, Katelyn) (Entered: 02/21/2018)
02/20/2018	127	NOTICE Resetting a Hearing. Status Conference set for 5/23/2018 02:00 PM in Courtroom 19 before Chief Judge Patti B. Saris. (Coppola, Katelyn) (Entered: 02/21/2018)
02/20/2018	128	Set/Reset Deadlines: Discovery to be completed by 4/30/2018, Summary judgment to be completed by 5/31/2018. (Coppola, Katelyn) (Entered: 02/21/2018)
02/26/2018	129	Assented to MOTION to Stay *Pending Supreme Court Proceedings* by New Prime,

Date Filed	#	Docket Text
		Inc..(Lipshutz, Joshua) (Main Document 129 replaced on 2/27/2018. Memorandum In Support was separated and added as it's own entry.) (Coppola, Katelyn). (Entered: 02/26/2018)
02/27/2018	130	MEMORANDUM in Support re 129 Assented to MOTION to Stay *Pending Supreme Court Proceedings* filed by New Prime, Inc.. (Coppola, Katelyn) (Entered: 02/27/2018)
03/06/2018	131	Chief Judge Patti B. Saris: ENDORSED ORDER entered ALLOWED 129 Assented to MOTION to Stay Pending Supreme Court Proceedings (Geraldino-Karasek, Clarilde) (Entered: 03/08/2018)
03/08/2018	132	SET DEADLINES : STATUS REPORT DUE BY 9/28/2018 (Geraldino-Karasek, Clarilde) (Entered: 03/08/2018)
03/08/2018	133	Chief Judge Patti B. Saris: ORDER entered. ORDER OF ADMINISTRATIVE STAY/CLOSING. (Geraldino-Karasek, Clarilde) (Entered: 03/08/2018)

INDEPENDENT CONTRACTOR OPERATING AGREEMENT

THIS AGREEMENT is made and entered into this 31 day of May 2013, by and between NEW PRIME, INC. ("Prime") and ("Contractor" or "You").

Prime is a for-hire motor carrier and utilizes independent contractors to assist in its business. You are willing to lease the following-described tractor (the "Equipment") to Prime for the purpose of hauling freight pursuant to the terms and conditions of this Agreement: 1 Year 2012 Make FRGHT Serial No. 1FUJGLDR9CSBA3671 License No. 12AR5H State MO;

NOW, THEREFORE, in consideration of the mutual covenants herein contained and for other good and valuable consideration, it is hereby agreed as follows:

1. LEASE. You hereby lease to Prime the Equipment from the date of this Agreement—through December 31 of the same year. Thereafter, this Agreement shall continue from year to year unless otherwise terminated as provided herein. During the term of this Agreement; Prime shall have exclusive possession, control and use of the Equipment and complete responsibility for the operation of the Equipment. The provision in the preceding sentence is set forth solely to conform with federal regulations and is not to be used for any other purposes, including any attempt to classify You as an employee of Prime. 49 CFR 376.12 (c) (4) provides that nothing in the provisions required by 49 CFR 376.12 (c) (1) is intended to effect whether You or any driver provided by You is an independent: contractor or an employee of the Carrier.

Prime shall retain the original of this Agreement, a signed copy shall be maintained in each piece of the Equipment, and one signed copy shall be maintained by You.

2. SERVICE. The parties agree that the intent of this Agreement is to establish an independent contractor relationship at all times. You agree to make the Equipment available to Prime, with qualified and Prime Certified drivers, to pick up loads and transport them to; destinations designated by various shippers. You shall determine the means and methods of performance of all transportation services undertaken under the terms of this Agreement, including driving times and deliver routes. You may refuse to haul any load offered to You by Prime. You have the right to provide services for another carrier during the term of this Agreement, provided that (i) You remove all identification devices, licenses and base plate's from the Equipment and return to Prime, and (i.i.) You provide Prime five (5) business days u notice of Your intent to provide services for another carrier.

3. PAYMENT. Prime shall play You amounts,' as itemized on Schedule 1 within fifteen (15) days after You give Prime properly completed logs and al documents required by the shippers of loads You haul in order for Prime to be paid. All such payments shall be reflected In an operator's settlement which Prime shall produce both on a weekly basis and as a final statement following termination (the "Settlement"). Upon termination of this Agreement, Your final payment is contingent upon Your removal of all Prime identification devices. Prime will be entitled to recover from You those devices in the form of decals or placards on the Equipment and return of

those devices to Prime in the manner specified in paragraph 7(d) hereof, unless they are painted directly on the Equipment, together with all of Your Comdata cards. If an identification device has been lost or stolen, a letter certifying that fact shall suffice. Payment to You shall be made contingent upon submission of a bill of lading to which no exceptions shall be taken.

4. QUALCOMM. Your Equipment must contain a Qualcomm unit which will work in conjunction with Prime's Qualcomm System. You hereby authorize Prime to deduct amounts specified in Schedule from Your Settlement to make such rental payments together with all monthly usage fees, including Excess message charges. You are responsible for the timely return of any rented Qualcomm device upon the termination: of this Agreement. If you lease a Qualcomm unit from Prime land if the unit is damaged or lost You agree to reimburse Prime the entire cost incurred by Prime in repairing or replacing the unit. You hereby authorize Prime to deduct an amount equal to the cost from Your Settlement at such time as Prime chooses. If the unit is not returned upon termination, You agree to reimburse Prime its cost incurred in replacing the unit and You hereby authorize Price to deduct such cost from Your final Settlement. If funds are not available to do so, You agree to pay Prime its cost of collection including reasonable attorney's fees.

5. ADVANCES. If You have secured advances from Prime, You hereby authorize Prime to deduct an amount equal to the advances from Your Settlement at such time as Prime chooses.

6. TRAILER INSPECTION. You agree to make a visual inspection prior to assuming control of

trailers furnished by Prime: and immediately report any existing damage or defects, and also to report any damage that occurs while the trailer is under Your control. If You fail Ito report any existing damage or defects prior to assuming control of the trailer, and the next driver following You who assumes controlled that trailer reports damage or defects prior to his assuming control, then You agree to pay to Prime the actual cost of repairing such damage or defects.' You hereby authorize Prime to deduct from Your Settlement lament an amount equal to the cost of repair.

7. PERFORMANCE BOND.

(a) Amount and Set Off. You will deposit with Prime One Thousand Dollars ($1,000.00) as security for the full performance of Your financial obligations to Prime as set forth in this Agreement. Prime may set off any part of the Performance Bond against (i) cash advances made by Prime to You or for the benefit of Your drivers; (ii) all expenses specifically itemized in paragraphs 8, 9 and 10 hereof; (iii) all costs of Your insurance for coverages itemized in paragraph 11 hereof which Prime has advanced payment for; (iv) automobile liability, cargo and trailer damage claims for which You are liable to Prime as set forth in paragraph 12 hereof; (v) all amounts charged by Prime pursuant to paragraph 13 hereof; (vi) advances made to You or on Your behalf as specified in Schedule 2 hereof; (vii) all amounts charged You by Prime or paid on Your behalf by Prime as itemized on Schedule 3 hereof and accounted for in Your Weekly Settlement; (viii) advances set forth in paragraph 29; and (ix) all other obligations incurred by You, which have been specified in this Agreement. If Performance Bond funds are set puff, You shall provide

additional money so that the Performance Bond equals One Thousand Dollars ($1,000.00). In the event You fail to replenish the Performance Bond as required, You hereby authorize Prime to deduct from Your Settlement amounts necessary to replenish the Performance Bond as required. If you do not deposit the full amount of the Performance Bond, You authorize Prime to deduct from Your Settlement the amounts indicated in Schedule 3 in order to fulfill this obligation.

(b) Interest. Prime will pay You interest on the Performance Bond quarterly. This Interest rate shall be equal to the average yield on Ninety-One (91) Day, Thirteen (13) Week Treasury Bills as established in the weekly auction by the Department of the Treasury.

(c) Accounting. Prime will provide You an accounting of the Performance Bond it any time requested by You. Prime shall also indicate on Your Settlement sheets the amounts and description of any deductions or additions made to the Performance Bond.

(d) Return. Upon termination of this Agreement, in order to have the Performance 55M—Returned to You, You must first return to Prime all of Prime's placards and other identification devices, other than those painted directly on the Equipment; Your Comdata card, all base plates, permits, licenses, pre-pass toll transponder, properly completed logs and documents necessary to receive payments for trips made under this Agreement, You may either bring these items to Prime's terminal or deliver them to Prime via mail or other form of conveyance of Your choice. If You bring the Equipment to Prime's terminal Prime will remove all identification devices. If not, You shall be responsible for their removal. Prime shall pro-

vide a final accounting, itemizing all deductions, and return all amounts due You from the Performance Bond within forty-five (45) days of the termination.

8. EXPENSES. You shall pay all operating and maintenance expenses in connection with the operation of the Equipment, including but not limited to fuel, fuel taxes, Federal Highway Use Taxes, tolls, ferries, detention, accessorial services, tractor repairs and Seventy-Two percent (72%) of any agent or brokerage fees charged against line haul revenues received by Prime for any freight transported by You. At your request, Prime will make advances for the payment of such expenses, and You hereby authorize Prime to deduct from Your Settlement amounts equal to the advances. Except when a violation results from Your acts or omissions, Prime shall assume the risk and costs of fines for overweight and oversized trailers when the trailers are preloaded, sealed, or the load is containerized) or when the trailer or lading is otherwise outside Your control, and for improperly permitted over-dimensions and overweight loads. Prime shall reimburse You for any fines paid by You which are Prime's responsibility. You shall be responsible for loading and unloading of trailers.

9. LICENSES, PERMITS AND AUTHORIZATIONS.

(a) Purchase. You are required to obtain, at Your expense, a base plate under the international Registration Plan("IRP") permitting the Equipment to be operated in all forty-eight (48), contiguous states. Alternatively, You may authorize Prime to obtain on Your behalf, but at Your expense, all licenses, permits, IRP base plates and authorizations required .for operation of the Equipment. Upon

such authorization You agree to reimburse Prime for such expenses, and You hereby authorize Prime to make the deductions from Your Settlement amounts as set forth in Schedule 3.

(b) Return. During the term of the Agreement, as well as after termination, all licenses, permits, base plates; pre-pass toll transponder and authorizations, as well as all placards, provided to You by Prime shall be the property of Prime, and upon termination of this Agreement, You shall, within seven (7) days return all such licenses, permits, base plates, pre-pass toll transponder, placards and authorizations to Prime. All identification devices shall be returned in the manner specified in paragraph 7(d) hereof. Any unused portion of the base plate will be credited to You if Prime receives a refund or credit from the issuing authority or upon transfer to any other vehicle in Prime's fleet.

10. DRIVERS. You shall (i) drive the Equipment Yourself, (ii) employ, on Your own behalf, drivers for the Equipment, or (iii) lease drivers for the Equipment.

(a) Contractor's Employees. If You employ, on Your own behalf drivers for the Equipment, you shall be sole. responsible for payment of their wages, benefits, Social Security taxes, withholding taxes unemployment insurance fees, and all other amounts required government agencies to be paid by employers on behalf of or to employees. All by drivers employed by You to operate the Equipment shall be qualified so as to meet requirements of all federal, state and local laws and the rules, and regulations of the Department of Transportation. All such drivers must first be certified by Prime. You shall likewise employ on Your Own behalf and' at

Your own expense all driver's helpers and other laborers required to carry out the purpose of this Agreement. At Your request, Prime shall' make payments to Your employees and for their benefit and on their behalf. You shall reimburse Prime for all such expenses and hereby authorize Prime to deduct from Your Settlement amounts required to make such reimbursements. All such reimbursements shall be equal to payments made by Prime.

(b) Leased Drivers. If You lease drivers for the Equipment, You hereby authorize Prime to make advances for all amounts required to reimburse the leasing entity with whom You contracted for services of the drivers. You shall reimburse Prime for all such, expenses and hereby authorize Prime to deduct from your Settlement amounts required to make such reimbursements. All such reimbursements shall be equal to payments made by Prime. All Leased Drivers must first be certified by` rime.

11. INSURANCE

(a) Liability. Prime shall provide and maintain auto liability insurance for the protection of the public pursuant to FMCSA Regulations under 49 USC 13906. Said liability insurance may not necessarily insure You against loss.

(b) Non-Trucking Use Auto Liability Coverage. You shall provide and maintain at Your own expel-se non-trucking use auto liability insurance coverage. This coverage, whether referred to As "bobtail", unladened", "deadhead" or otherwise, shall provide coverage for all risks for movement of the Equipment when it is not under dispatch by Prime. Prime shall be named as an additional insured on the policy, which shall 'have limits of not less than $1 million per occurrence, CSL. This policy of insurance

shall be primary to and without right of contribution from all other insurance available to Prime.

(c) Cargo Insurance. Prime shall secure and maintain Cargo Liability Insurance.

(d) Physical Damage Insurance. Prime shall provide and maintain at its own expense physical damage insurance on its trailers.

(e) Occupational Injuries. You shall either (i) make an election to procure Workers' Compensation Insurance protection against injuries sustained while in pursuit of Your] business, for Yourself and Your drivers, and thereafter provide and maintain at Your own expense such insurance; or (ii) provide and maintain at Your expense a suitable alternative insurance, such as occupational accident insurance, for Yourself and Your drivers, which insurance must be approved by Prime.

(f) Health and Life Insurance. You may elect to purchase health and life insurance through Prime.; It You do sod You hereby authorize Prime to deduct such cost from Your Settlement. Because such insurance may not go into effect at the time of the execution of this Agreement, and the premiums may change from time to time, You agree that the 'provisions of paragraph 18 of this Agreement apply to such deductions. The cost of this insurance shall be the actual premium charged by the 'insurance company. However, under some health policies of insurance which Prime purchases, a portion of the premium may be retained by Prime in a claims pool for the purpose of paying claims. If, at the end of the policy period, there are any funds remaining in the claims pool, Prime retains those funds.

(g) Procuring of Insurance by Prime. Upon Your request, an insurance broker working with Prime and knowledgeable of the requirements within this Agreement will provide You with coverage information and applications for insurance coverage required of You by this Agreement. If You elect to procure insurance through that insurance broker, You hereby authorize Prime to deduct the cost of such insurance from Your Settlement and forward those amounts to such insurance broker. The cost of all such insurance coverages shall be itemized On Schedule 3 of this Agreement. Prime, or the insurance broker, will furnish to You a certificate of insurance for each policy You purchase and a copy of leach policy shall be furnished to You upon request. You shall remain financially responsible to the insurance broker and/or insurer for any insurance costs not paid due to an insufficiency of Settlement funds.

(h) Proof of Insurance. All insurance coverage provided by You as required by this Agreement shall be in form and 'substance, and issued by a company satisfactory to Prime. You shall continuously provide Prime with proof of such insurance either by ',current binder or certificates of insurance from the date of the execution of this Agreement until its termination.

12. ACCIDENTS, CLAIMS, LOSSES AND EXPENSES.

(a) Auto Liability. Prime and its auto liability insurer may settle any claim against Prime arising out of the maintenance, use or control of the Equipment. You shall pay Prime Up to Five Hundred Dollars ($500.00) per occurrence for the settlement of any such claim and related expenses.

(b) Cargo. You shall pay Prime up to Five Hundred Dollars ($500.00) per occurrence toward the settlement of cargo losses directly caused by fire, collision, overturning of vehicle, collapse of bridges or docks, rising navigable waters oil river floods, perils of the seas, lakes, rivers or inland water while on ferries only, and cyclone, tornado or windstorm. If cargo losses are caused by any peril other than those itemized above, You will pay Prime that portion of such losses and expenses for which Prime does not receive payment from their insurance carrier.

(c) Damage to Trailers. You shall pay Prime up to Five Hundred Dollars ($500.00) per occurrence toward loss of, damage to, or liens for storage with respect to Prime's trailers which: are used by You when such losses are covered by Prime's insurance. When 'the loss of, damage to, or liens for storage of Prime's trailers which are used by You are not covered by insurance, You shall pay for all such losses, including expenses and attorneys' fees.

(d) Authorization to Deduct. You Hereby authorize Prime to deduct from Your Settlement all amounts due Prime under this paragraph 12. Prime shall provide You with a written explanation and itemization of any such deductions for cargo or property damage before such deductions are made.

(e) HOLD HARMLESS AND INDEMNIFICATION. YOU AGREE TO INDEMNIFY AND HOLD HARMLESS PRIME, ITS AFFILIATED COMPANIES AND THEIR RESPECTIVE OFFICERS, DIRECTOR, SHAREHOLDERS, EMPLOYEES, AGENTS, SUCCESSORS AND ASSIGNS, FROM AND AGAINST ANY AND ALL LIABILITIES AND

EXPENSES WHATSOEVER, INCLUDING, WITHOUT LIMITATION, CLAIMS, DAMAGES, JUDGMENTS, AWARDS, SETTLEMENTS, INVESTIGATIONS, COSTS AND ATTORNEY'S FEES (COLLECTIVELY, "CLAIMS") WHICH ANY OF THEM MAY INCUR OR BECOME OBLIGATED TO PAY ARISING OUT OF YOUR ACTS OR OMISSION OR THOSE OF YOUR AGENTS AND EMPLOYEES (INCLUDING DRIVERS LEASED YOUR PRIME). YOU FURTHER AGREE TO HOLD PRIME HARMLESS AND TO INDEMNIFY PRIME AGAINST ALL CLAIMS BY YOU AND YOUR AGENTS AND EMPLOYEES. I UNDERSTAND THAT THIS PARAGRAPH LIMITS MY RIGHTS AND I ACKNOWLEDGE MY OPTION TO SEEK INDEPENDENT LEGAL COUNSEL AND ADVICE.

13. OPERATING STATEMENT AND PAYROLL SERVICES. At your request, Prime may provide You with an operating statement, and You nearby authorize Prime to make a deduction from Your Settlement an amount as set forth in Schedule 3. In the event Primero vides services for Your co-drivers, You hereby authorize Prime to make a deduction from Your Settlement in amount as set forth in Schedule 3.

14. CITATIONS. At Your request, Prime shall provide You with administrative services in connection with citations You receive while operating under Prime's authority, and advance money for payment of them. You agree to pay and hereby authorize Prime to deduct from Your Settlement an amount equal to the fee as set forth in Schedule 3, as well as an amount equal. to the payment made ion Your behalf. You are under no obligation to submit Your ci-

tations to Prime for handling. However, You agree to report all citations to Prime.

15. FUEL CARD EXPRESS CODES TRIP EXPRESS CHARGE. You agree that, in in the event You utilize Prime's fuel card system and express code transaction system, You will pay to Prime and hereby authorize Prime to deduct from Your Settlement an amount as set forth in Schedule 3.

16. TRACTOR PAYMENT DEDUCTION (IF APPLICABLE). You are leasing X or purchasing _ (check one) Your tractor from SUCCESS LEASING Your payments are itemized in Schedule 2 attached hereto and made a part hereof. In addition, You are required by Your lessor or lender to place certain sums in reserve accounts as itemized in schedule 2. By initialing Schedule 2 You authorize and request Prime to deduct those sums itemized in Schedule 2 from Your Settlement and forward them to Your lessor or lender. If the agreement with Your lessor or lender authorizes Prime to make deductions from Prime's Settlement with You for rental or purchase payments, You must provide Prime with a copy of that agreement and It shall be attached to this Agreement and made a part hereof by this reference.

17. ADDITIONAL SETTLEMENT DEDUCTIONS. From time to time, You may purchase fuel, products or services, including repairs, which are charged to Prime. When You do so, You hereby authorize Prime to deduct from Your Settlement amounts equal to such charges. You are never required to charge any amounts to Prime's account not to make purchases from any vendor recommended by Prime. Further, if You lease Your tractor, You may be required by Your lessor to indemnify Your lessor for claims arising out of Your acts and omissions as

well as those of Your agents and employees, and to pay for portions of any loss or damage to Your tractor, When Your lease requires any such payments, You hereby authorize Prime to deduct from Your settlement amounts equal to such charges.

18. RATIFICATION OF DEDUCTIONS. In paragraphs 4, 5, 6, 7, 8, 9, 10, 11(f), 12, 14, 17 and 1-9 at this Agreement, Prime has agreed to make certain advances to You or on Your behalf. You have agreed to allow Prime to make deductions from Your Settlement as reimbursement for those advances. Because those advances are not capable of determination at the time of the execution of this Agreement, they shall be disclosed to You from time to time in Your Settlement. To the extent Prime is required to disclose deductions to You, that requirement regarding any such deductions shall be deemed fulfilled through Prime providing You with a Settlement. However, upon request, Prime will provide You copies of those documents which are necessary to determine the validity of the charge. Computation of each item shall be on the basis of, the actual amount of each advance, charge or expense. If You have not objected to any such deduction in writing within ninety (90) days of the date of the Settlement, the deduction shall be deemed ratified by You.

19. NEGATIVE BALANCE. If You have a negative balance on Your Settlement after calculating all payments dud You less all deductions authorized herein, and if Prime has not offset that negative amount, against Your security deposit, You agree to pay to Prime interest On such negative balance at a rate equal to the average yield on Ninety-One-Day, Thirteen-Week Treasury Bills as established in the weekly auction by the Department of Treasury. In-

terest shall be paid on the average weekly amount of Your negative balance.

If You have a substantial negative balance on that Your cash flow is affected, and if Prime agrees, You may convert some or all of that negative balance to periodic payments to Prime (the "Advance"). In that event You and Prime shall agree on the frequency of payments and You agree to pay to Prime interest on the Advance at the rate of 12% per annum. Provided, however in the event the Prime Rate (of U. S. money center commercial banks as published in The Wall Street Journal) shall equal or exceed 10%, You agree to pay to Prime interest on the Advance at the Prime Rate plus 2%.

20. FREIGHT BILLS AND TARIFFS. Prime shall provide You with a copy of Prime's rated freight bill or a computer-generated document containing the same information, and, upon request, You shall have the right to examine Prime's tariffs at all reasonable times, as well as documents from which contract rates and charges are computed. Mileage is based on the latest version of the Household Goods Carrier's Bureau Mileage Guide, unless otherwise specified by Prime's customers.

21. PRIME'S SERVICES, PRODUCTS AND EQUIPMENT. You shall not be required to purchase or rent any products, equipment or services from Prime as a condition of entering into this Agreement. In the event that You elect to purchase or rent any products, equipment or services from or through Prime, You agree that Prime may deduct amounts due for such products, equipment or services from the compensation due You. You and Prime agree that such amounts will include the cost of such products equipment or services and may include amounts to

cover Prime's administrative costs, either direct or indirect, of securing, offering and maintaining such products, equipment and services.

22. TERMINATION. Either party may Terminate this Agreement by giving (30) days written notice of such intention to the other party. In the event either party commits a material breach of this Agreement, the other shall have the right to terminate this Agreement by giving five (5) days' written notice of such intention. Shipping requirements of Prime's customers are an essential part of Prime's business, and failure to adhere to such requirements may be deemed to be a material breach of this Agreement. The DOT has charged Prime with the duty of requiring You to observe safety standards while operating the Equipment under Prime's authority. It is agreed that Prime may terminate this Agreement immediately if it has information or knowledge or belief that the safety of the public is, being endangered by You or Your agents or employees in the operation of the Equipment. In the event this Agreement is terminated by either party or upon the expiration of this Agreement You shall, within forty-eight (48) hours, return all of Prime's property to Prime at a location specifically designated by Prime. If You shall fail to return Prime's property as provided herein, You shall be responsible for all expenses incurred by Prime in securing the proper return of said property. Such expenses may be charged back against any amounts owed You by Prime.

23. NOTICES. All notices, requests, instructions, consents and other communications to be given pursuant to this Agreement shall be in writing and shall be deemed received (i) on the same day if delivered in person, by same day courier or by telegraphy

telex or facsimile transmission; (ii) on the next day if delivered by overnight mail or courier; or (iii) on the date indicated on the return receipt, or if there is no such receipt, on the third calendar day (excluding Sundays) if delivered by certified or registered mail, postage prepaid, to the party for whom intended to the following addresses:

If to Prime: Manager, Contractor Relations
P.O. Box 4208
Springfield, MO 65808

If to Contractor: HALLMARK TRUCKING LLC
40 DUGGAN DR
LEOMINSTER MA 01453

Each party may, by written notice given to the other in accordance with this Agreement, change the address to which notices to such party are to be delivered.

24. RELATIONSHIP OF PARTIES. The parties intend to create by this Agreement the relationship of carrier and Independent Contractor and not an employer/employee relationship. You are and shall be deemed for all purposes to be an Independent Contractor 'not an employee of Prime. Neither You, Your employees, agents or servants, if any, are to be considered employees of Prime at any time, under any circumstance or for any purpose.

25. ASSIGNMENT. You shall not assign this Agreement or any rights or obligations hereunder to anyone Without the written consent of Prime.

26. DESIGNATION OF PAYEE. You agree that, in the event there is more than one (1) individual named as the Contractor on the face age of this Agreement, that those persons so named will designate in writing which one of them shall be entitled to

receive the weekly Settlement check due under the terms of this Agreement. Any change in such designation must be in writing and must be executed by all individuals named as Contractor herein. The purpose of this paragraph is to allow Prime to make one (1) Settlement check payable to one (1) of the individuals named as Contractor without retaining any exposure whatsoever for payment to the other named Contractor.

The following named Co-Contractor is hereby designated as the individual to receive all weekly Settlement checks in this name only:

APPROVED: _____

_____

27. MODIFICATION OF SCHEDULES. From time to time during the term of this Agreement amounts required to purchase insurance from a Prime affiliate or through Prime, lease or purchase payments, reserve account requirements, Qualcomm user fees and other like items may be changed from those amounts set forth on the Schedules attached hereto by the person making such charges, In such event and upon receipt in writing of notice of such modification by Prime from the person making the modification, Prime shall notify You in writing of such change. Unless You instruct Prime in writing to the contrary within ten (10) days of the date of Prime's notice to You, the appropriate Schedule shall be deemed modified to reflect the new amount bring charged and the Schedule shall be deemed by the parties as being amended accordingly.

28. SET-OFF. You hereby rant to Prime the right of immediate set off against Your weekly Set-

tlement of all amounts due from You to Prime under the terms of this Agreement.

29. LEASE EXPENSES ADVANCES. If You lease Your Tractor from Success Leasing, Inc. ("Success"), Our Lease contains financial obligations in addition to Lease Charges, Excess Mileage charge and Tire Replacement Reserve. Those additional obligations are foundling paragraphs 10, 12, 14, 15, 17 and 19(d) of Your Lease. Those obligations may be advanced by Success or Prime on Your behalf. In the event they are, You hereby authorize Prime to deduct from Your Settlement or Your Performance Bond amounts equal to such advances and remit to the entity which made the advance. The amount deducted shall be the actual cost of each such obligation.

30. GOVERNING LAW AND ARBITRATION. THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF THE STATE OF MISSOURI. ANY DISPUTES ARISING UNDER, ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING AN ALLEGATION OF BREACH THEREOF, AND ANY DISPUTES ARISING OUT OF OR RELATING TO THE RELATIONSHIP CREATED BY THE AGREEMENT, AND ANY DISPUTES AS TO THE RIGHTS AND OBLIGATIONS OF THE PARTIES, INCLUDING THE ARBITRABILITY OF DISPUTES BETWEEN THE PARTIES, SHALL BE FULLY RESOLVED BY ARBITRATION IN ACCORDANCE WITH MISSOURI'S ARBITRATION ACT AND/OR THE FEDERAL ARBITRATION ACT, ANY ARBITRATION BETWEEN THE PARTIES WILL BE GOVERNED BY THE COMMERCIAL ARBITRATION RULES OF THE AMERICAN

ARBITRATION ASSOCIATION (THE RULES"). THE PARTIES SPECIFICALLY AGREE THAT NO DISPUTE MAY BE JOINED WITH THE DISPUTE OF ANOTHER AND AGREE THAT CLASS ACTIONS UNDER THIS ARBITRATION PROVISION ARE PROHIBITED. IN THE EVENT OF CONFLICT BETWEEN THE RULES AND THE PROVISIONS OF THIS AGREEMENT, THE PROVISIONS OF THIS AGREEMENT SHALL CONTROL. EXCEPTIONS/CLARIFICATIONS OF THE RULES INCLUDE: (i) THE PROCEEDINGS SHALL BE CONDUCTED BY A SINGLE, NEUTRAL ARBITRATOR TO BE SELECTED BY THE PARTIES, OR, FAILING THAT, APPOINTED IN ACCORDANCE WITH THE RULES, (ii) THE SUBSTANTIVE LAW OF THE STATE OF MISSOURI SHALL APPLY, AND (iii) THE AWARD SHALL BE CONCLUSIVE AND BINDING. A DEMAND FOR ARBITRATION SHALL BE FILED NOT LATER THAN ONE (1) YEAR AFTER THE DISPUTE ARISES OR THE CLAIM ACCRUES, AND FAILURE TO FILE SAID DEMAND WITH THE ONE (1) YEAR PERIOD SHALL BE DEEMED A FULL WAIVER OF THE CLAIM. THE PLACE OF THE ARBITRATION HEREIN SHALL BE SPRINGFIELD, MISSOURI. BOTH PARTIES AGREE TO BE FULLY AND FINALLY BOUND BY THE ARBITRATION AWARD, AND JUDGMENT MAY BE ENTERED ON THE AWARD IN ANY COURT HAVING JURISDICTION THEREOF. THE PARTIES AGREE THAT THE ARBITRATION FEES SHALL SPLIT BETWEEN THE PARTIES, UNLESS CONTRACTOR SHOWS THAT THE ARBITRATION FEES WILL IMPOSE A SUBSTANTIAL FINANCIAL HARDSHIP ON CONTRACTOR AS DETERMINED BY THE

ARBITRATOR, IN WHICH EVENT PRIME WILL PAY THE ARBITRATION FEES.

31. ENTIRE AGREEMENT. This Agreement shall be comprised of this document executed below by You and Prime as well as all Schedules initialed by You (as amended from time to time as herein provided). Together they constitute the entire agreement between the parties hereto and may not be modified or amended except by written agreement executed by both parties or, in the case of the Schedules, as otherwise herein provided.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals on the day and year first written herein.

THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.

NEW PRIME, INC.

By: _____

"Prime"

_____

_____

"Contractor"

By Your initials on this page You acknowledge receipt of a copy of this Agreement from Prime

_____

_____

"Co-Contractor"

INDEPENDENT CONTRACTOR OPERATING AGREEMENT

THIS AGREEMENT is made and entered into this 12 day of March, 2014, by and between NEW PRIME, INC. ("Prime") and ("Contractor" or "You").

Prime is a for-hire motor carrier and utilizes independent contractors to assist in its business. You are willing to lease the following-described tractor (the "Equipment") to Prime for the purpose of hauling freight pursuant to the terms and conditions of this Agreement: Year 2015 Make FRGHT Serial No.3AKJGLD54FSFN2731 License No. _____ State MO

NOW, THEREFORE, in consideration of the mutual covenants herein contained and for other good and valuable consideration, it is hereby agreed as follows:

1. LEASE. You hereby lease to Prime the Equipment from the date of this Agreement through December 31 of the same year. Thereafter, this Agreement shall continue from year to year unless otherwise terminated as provided herein. During the term of this Agreement, Prime shall have exclusive possession, control and use of the Equipment and complete responsibility for the operation of the Equipment. The provision in the preceding sentence is set forth solely to conform with federal regulations and is not to be used for any other purposes, including any attempt to classify You as an employee of Prime. 49 CFR 376.12 (c) (4) provides that nothing in the provisions required by 49 CFR 376.12 (c) (1) is intended to effect whether You or any driver provided by You is an independent contractor or an employee of the Carrier.

Prime shall retain the original of this Agreement, a signed copy shall be maintained in each piece of the Equipment, and one signed copy shall be maintained by You.

2. SERVICE. The parties agree that the intent of this Agreement is to establish independent contractor relationship at all times. You agree to make the Equipment available to Prime, with qualified and Prime Certified drivers, to pick up loads and transport them to destinations designated by various shippers. You shall determine the means and methods of performance of all transportation services undertaken under the terms of this Agreement, including driving times and delivery routes. You may refuse to haul any load offered to You by Prime. You have the right to provide services for another carrier during the term of this Agreement, provided that (i) You remove all identification devices, licenses and base plates from the Equipment and return to Prime, and (ii) You provide Prime five (5) business days' notice of Your intent to provide services for another carrier.

3. PAYMENT. Prime shall pay You amounts as itemized on Schedule 1 within fifteen (15) days after You give Prime properly completed logs and all documents required by the shippers of loads You haul in order for Prime to be paid. All such payments shall be reflected in an operator's settlement which Prime shall produce both on a weekly basis and as a final statement following termination (the "Settlement"). Upon termination of this Agreement, Your final payment is contingent upon Your removal of all Prime identification devices. Prime will be entitled to recover from You those devices in the form of decals or placards on the Equipment and return of those devices to Prime in the manner specified in para-

graph 7(d) hereof, unless they are painted directly on the Equipment, together with all of Your Comdata cards. If an identification device has been lost or stolen, a letter certifying that fact shall suffice. Payment to You shall be made contingent upon submission of a bill of lading to which no exceptions shall be taken.

4. QUALCOMM. Your Equipment must contain a Qualcomm unit which will work in conjunction with Prime's Qualcomm system. You hereby authorize Prime to deduct amounts specified in Schedule 3 from Your Settlement to make such rental payments together with all monthly usage fees, including Excess message charges. You are responsible for the timely return of any rented Qualcomm device upon the termination of this Agreement. If you lease a Qualcomm unit from Prime, and if the unit is damaged or lost, You agree to reimburse Prime the entire cost incurred by Prime in repairing or replacing the unit. You hereby authorize Prime to deduct an amount equal to the cost from Your Settlement at such time as Prime chooses. If the unit is not returned upon termination, You agree to, reimburse Prime its cost incurred in replacing the unit and You hereby authorize Prime to deduct such cost from Your final Settlement. If funds are not available to do so, You agree to pay Prime its cost of collection including reasonable attorney's fees.

5. ADVANCES. If You have secured advances from Prime, You hereby authorize Prime deduct an amount equal to the advances from Your Settlement at such time as Prime chooses.

6. TRAILER INSPECTION. You agree to make a visual inspection prior to assuming control of trailers furnished by Prime and immediately report

any existing damage or defects, and also to report any damage that occurs while the trailer is under Your control. If You fail to report any existing damage or defects prior to assuming control of the trailer, and the next driver following You who assumes control of that trailer reports damage or defects prior to his assuming control, then You agree to pay to Prime the actual cost of repairing such damage or defects. You hereby authorize Prime to deduct from Your Settlement an amount equal to the cost of repair.

7. PERFORMANCE BOND.

(a) Amount and Set Off. You will deposit with Prime Fifteen Hundred Dollars ($1,500.00) as security for the full performance of Your financial obligations to Prime as set forth in this Agreement. Prime may set off any part of the Performance Bond against (i) cash advances made by Prime to You or for the benefit of Your drivers; (ii) all expenses specifically itemized in paragraphs 8, 9 and 10 hereof; (iii) all costs of Your insurance for coverages itemized in paragraph 11 hereof which Prime has advanced payment for; (iv) automobile liability, cargo and trailer damage claims for which You are liable to Prime as set forth in paragraph 12 hereof; (v) all amounts charged by Prime pursuant to paragraph 13 hereof; (vi) advances made to You or on Your behalf as specified in Schedule 2 hereof; (vii) all amounts charged You by Prime or paid on Your behalf by Prime as itemized on Schedule 3 hereof and accounted for in Your Weekly Settlement; (viii) advances set forth in paragraph 29; and (ix) all other obligations incurred by You which have been specified in this Agreement. If Performance Bond funds are set off, You shall provide additional money so that the Performance Bond equals Fifteen Hundred dollars ($1,500.00). In the event You fail to

replenish the Performance Bond as required, You hereby authorize Prime to deduct from Your Settlement amounts necessary to replenish the Performance Bond as required. If You do not deposit the full amount of the Performance Bond, You authorize Prime to deduct from Your Settlement the amounts indicated in Schedule 3 in order to fulfill this obligation.

(b) Interest. Prime will pay You interest on the Performance Bond quarterly. This interest rate shall be equal to the average yield on Ninety-One (91) Day, Thirteen (13) Week Treasury Bills as established in the weekly auction by the Department of the Treasury.

(c) Accounting. Prime will provide You an accounting of the Performance Bond at any time requested by You. Prime shall also indicate on Your Settlement sheets the amounts and description of any deductions or additions made to the Performance Bond.

(d) Return. Upon termination of this Agreement, in order to have the Performance Bond returned to You, You must first return to Prime all of Prime's placards and other identification devices, other than those painted directly on the Equipment, Your Comdata card, all base plates, permits, licenses, prepass toll transponder, properly completed logs and documents necessary to receive payments for trips made under this Agreement. You may either bring these items to Prime's terminal or deliver them to Prime via mail or other form of conveyance of Your choice. If You bring the Equipment to Prime's terminal, Prime will remove all identification devices. If not, You shall be responsible for their removal. Prime shall provide a final accounting, itemizing all deduc-

tions, and return all amounts due You from the Performance Bond within forty-five (45) days of the termination.

8. EXPENSES. You shall pay all operating and maintenance expenses in connection with the operation of the Equipment, including but not limited to fuel, fuel taxes, Federal Highway Use Taxes, tolls, ferries, detention, accessorial services, tractor repairs and Seventy-Two percent (72%) of any agent or brokerage fees charged against line haul revenues received by Prime for any freight transported by You. At your request, Prime will make advances for the payment of such expenses, and You hereby authorize Prime to deduct from Your Settlement amounts equal to the advances. Except when a violation results from Your acts or omissions, Prime shall assume the risk and costs of fines for overweight and oversized trailers when the trailers are preloaded, sealed, or the load is containerized, or when the trailer or lading is otherwise outside Your control, and for improperly permitted over-dimensions and overweight loads. Prime shall reimburse You for any fines paid by You which are Prime's responsibility. You shall be responsible for loading and unloading of trailers.

9. LICENSES, PERMITS AND AUTHORIZATIONS.

(a) Purchase. You are required to obtain, at Your expense, a base plate under the International Registration Plan ("IRP") permitting the Equipment to be operated in all forty-eight (48) contiguous states. Alternatively, You may authorize Prime to obtain on Your behalf, but at Your expense, all licenses, permits, IRP base plates and authorizations required for operation of the Equipment. Upon such authorization,

You agree to reimburse Prime for such expenses, and You hereby authorize Prime to make the deductions from Your Settlement amounts as set forth in Schedule 3.

(b) Return. During the term of this Agreement, as well as after termination, all licenses, permits, base plates, pre-pass toll transponder and authorizations, as well as all placards, provided to You by Prime shall be the INITIAL property of Prime, and upon termination of this Agreement, You shall, within seven (7) days, return all such licenses, permits, base plates, pre-pass toll transponder, placards and authorizations to Prime. All identification devices shall be returned in the manner specified in paragraph 7(d) hereof. Any unused portion of the base plate will be credited to You if Prime receives a refund or credit from the issuing authority or upon transfer to any other vehicle in Prime's fleet.

10. DRIVERS. You shall (i) drive the Equipment Yourself, (ii) employ, on Your own behalf, drivers for the Equipment, or (iii) lease drivers for the Equipment.

(a) Contractor's Employees. If You employ, on Your own behalf, drivers for the Equipment, You shall be solely responsible for payment of their wages, benefits, Social Security taxes, withholding taxes, unemployment insurance fees, and all other amounts required by government agencies to be paid by employers on behalf of or to employees. All drivers employed by You to operate the Equipment shall be qualified so as to meet requirements of all federal, state and local laws and the rules and regulations of the Department of Transportation. All such drivers must first be certified by Prime. You shall likewise employ on Your own behalf and at Your own expense all driv-

er's helpers and other laborers required to carry out the purpose of this Agreement. At Your request, Prime shall make payments to Your employees and for their benefit and on their behalf. You shall reimburse Prime for all such expenses and hereby authorize Prime to deduct from Your Settlement amounts required to make such reimbursements. All such reimbursements shall be equal to payments made by Prime.

(b) Leased Drivers. If You lease drivers for the Equipment, You hereby authorize Prime to make advances for all amounts required to reimburse the leasing entity with whom You contracted for services of the drivers. You shall reimburse Prime for all such expenses and hereby authorize Prime to deduct from your Settlement amounts required to make such reimbursements. All such reimbursements shall be equal to payments made by Prime. All Leased Drivers must first be certified by Prime.

11. INSURANCE

(a) Liability. Prime shall provide and maintain auto liability insurance for the protection of the public pursuant to FMCSA Regulations under 49 USC 13906. Said liability insurance may not necessarily insure You against loss.

(b) Non-Trucking Use Auto Liability Coverage. You shall provide and maintain at Your own expense non-trucking use auto liability insurance coverage. This coverage, whether referred to as "bobtail", "unladened", "deadhead" or otherwise, shall provide coverage for all risks for movement of the Equipment when it is not under dispatch by Prime. Prime shall be named as an additional insured on the policy, which shall have limits of not less than $1 million per occurrence, CSL. This policy of insurance shall be

primary to and without right of contribution from all other insurance available to Prime.

(c) Cargo Insurance. Prime shall secure and maintain Cargo Liability Insurance.

(d) Physical Damage Insurance. Prime shall provide and maintain at its own expense physical damage insurance on its trailers.

(e) Occupational Injuries. You shall either (i) make an election to procure Workers' Compensation insurance protection against injuries sustained while in pursuit of Your business, for Yourself and' Your drivers, and thereafter provide and maintain at Your own expense such insurance; or (ii) provide and maintain at Your expense a suitable alternative insurance, such as occupational accident insurance, for Yourself and Your drivers, which insurance must be approved by Prime.

(f) Procuring of Insurance by Prime. Upon Your request, an insurance broker working with Prime and knowledgeable of the requirements within this Agreement will provide You with coverage information and applications for insurance coverage required of You by this Agreement. If You elect to procure insurance through that insurance broker, You hereby authorize Prime to deduct the cost of such insurance from Your Settlement and forward those amounts to such insurance broker. The cost of all such insurance coverages shall be itemized on Schedule 3 of this Agreement. Prime, or the insurance broker, will furnish to You a certificate of insurance for each policy You purchase and a copy of each policy shall be furnished to You upon request. You shall remain financially responsible to the insurance broker and/or insurer for any insurance costs not paid due to an insufficiency of Settlement funds.

(g) Proof of Insurance. All insurance coverage provided by You as required by this Agreement shall be in form and substance, and issued by a company satisfactory to Prime. You shall continuously provide Prime with proof of such insurance either by current binders or certificates of insurance from the date of the execution of this Agreement until its termination.

12. ACCIDENTS, CLAIMS, LOSSES AND EXPENSES.

(a) Auto Liability. Prime and its auto liability insurer may settle any claim against Prime arising out of the maintenance, use or control of the Equipment. You shall pay Prime up to Five Hundred Dollars ($500.00) per occurrence for the settlement of any such claim and related expenses.

(b) Cargo. You shall pay Prime up to Five Hundred Dollars ($500.00) per occurrence toward the settlement of cargo losses directly caused by fire, collision, overturning of vehicle, collapse of bridges or docks, rising navigable waters or river floods, perils of the seas, lakes, rivers or inland water while on ferries only, and cyclone, tornado or windstorm. If cargo losses are caused by any peril other than those itemized above, You will pay Prime that portion of such losses and expenses for which Prime does not receive payment from their insurance carrier.

(c) Damage to Trailers. You shall pay Prime up to Five Hundred Dollars ($500.00) per occurrence toward loss of, damage to, or liens for storage with respect to Prime's trailers which are used by You when such losses are covered by Prime's insurance. When the loss of, damage to, or liens for storage of Prime's trailers which are used by You are not cov-

ered by insurance, You shall pay for all such losses, including expenses and attorneys' fees.

(d) Authorization to Deduct. You hereby authorize Prime to deduct from Your Settlement all amounts due Prime under this paragraph 12. Prime shall provide You with a written explanation and itemization of any such deductions for cargo or property damage before such deductions are made.

(e) HOLD HARMLESS AND INDEMNIFICATION. YOU AGREE TO INDEMNIFY AND HOLD HARMLESS PRIME, ITS AFFILIATED COMPANIES AND THEIR RESPECTIVE OFFICERS, DIRECTOR, SHAREHOLDERS, EMPLOYEES, AGENTS, SUCCESSORS AND ASSIGNS, FROM AND AGAINST ANY AND ALL LIABILITIES AND EXPENSES WHATSOEVER, INCLUDING, WITHOUT LIMITATION, CLAIMS, DAMAGES, JUDGMENTS, AWARDS, SETTLEMENTS, INVESTIGATIONS, COSTS AND ATTORNEY'S FEES (COLLECTIVELY, "CLAIMS") WHICH ANY OF THEM MAY INCUR OR BECOME OBLIGATED TO PAY ARISING OUT OF YOUR ACTS OR OMISSION OR THOSE OF YOUR AGENTS AND EMPLOYEES (INCLUDING DRIVERS LEASED FROM PRIME). YOU FURTHER AGREE TO HOLD PRIME HARMLESS AND TO INDEMNIFY PRIME AGAINST ALL CLAIMS BY YOU *AND* YOUR AGENTS AND EMPLOYEES. I UNDERSTAND THAT THIS PARAGRAPH LIMITS MY RIGHTS AND I ACKNOWLEDGE MY OPTION TO SEEK INDEPENDENT LEGAL COUNSEL AND ADVICE.

13. OPERATING STATEMENT AND PAYROLL SERVICES. At your request, Prime may provide You with an operating statement, and You

hereby authorize Prime to make a deduction from Your Settlement an amount as set forth in Schedule 3. In the event Prime provides services for Your co-drivers, You hereby authorize Prime to make a deduction from Your Settlement in amount as set forth in Schedule 3.

14. CITATIONS. At Your request, Prime shall provide You with administrative services in connection with citations You receive while operating under Prime's authority, and advance money for payment of them. You agree to pay and hereby authorize Prime to deduct from Your Settlement an amount equal to the fee as set forth in Schedule 3, as well as an amount equal to the payment made on Your behalf. You are under no obligation to submit Your citations to Prime for handling. However, You agree to report all citations to Prime.

15. FUEL CARD EXPRESS CODES/TRIP EXPRESS CHARGE. You agree that, in in the event You utilize Prime's fuel card system and express code transaction system, You will pay to Prime and hereby authorize Prime to deduct from Your Settlement an amount as set forth in Schedule 3.

16. TRACTOR PAYMENT DEDUCTION (IF APPLICABLE). You are leasing X or purchasing ___ (check one) Your tractor from SUCCESS LEASING Your payments are itemized in Schedule 2 attached hereto and made a part hereof. In addition, You are required by Your lessor or lender to place certain sums in reserve accounts as itemized in Schedule 2. By initialing Schedule 2 You authorize and request Prime to deduct those sums itemized in Schedule 2 from Your Settlement and forward them to Your lessor or lender. If the agreement with Your lessor or lender authorizes Prime to make deductions from

Prime's Settlement with You for rental or purchase payments, You must provide Prime with a copy of that agreement and it shall be attached to this Agreement and made a part hereof by this reference.

17. ADDITIONAL SETTLEMENT DEDUCTIONS. From time to time, You may purchase fuel, products or services, including repairs, which are charged to Prime. When You do so, You hereby authorize Prime to deduct from Your Settlement amounts equal to such charges. You are never required to charge any amounts to Prime's account nor to make purchases from any vendor recommended by Prime. Further, if You lease Your tractor, You may be required by Your lessor to indemnify Your lessor for claims arising out of Your acts and omissions as well as those of Your agents and employees, and to pay for portions of any loss or damage to Your tractor. When Your lease requires any such payments, You hereby authorize Prime to deduct from Your settlement amounts equal to such charges.

18. RATIFICATION OF DEDUCTIONS. In paragraphs 4, 5, 6, 7, 8, 9, 10, 11(f), 12, 14, 17 and 19 of this Agreement, Prime has agreed to make certain advances to You or on Your behalf. You have agreed to allow Prime to make deductions from Your Settlement as reimbursement for those advances. Because those advances are not capable of determination at the time of the execution of this Agreement, they shall be disclosed to You from time to time in Your Settlement. To the extent Prime is required to disclose deductions to You, that requirement regarding any such deductions shall be deemed fulfilled through Prime providing You with a Settlement. However, upon request, Prime will provide You copies of those documents which are necessary to de-

termine the validity of the charge. Computation of each item shall be on the basis of the actual amount of each advance, charge or expense. If You have not objected to any such deduction in writing within ninety (90) days of the date of the Settlement, the deduction shall be deemed ratified by You.

19. NEGATIVE BALANCE. If You have a negative balance on Your Settlement after calculating all payments due You, less all deductions authorized herein, and if Prime has not offset that negative amount against Your security deposit, You agree to pay to Prime interest on such negative balance at a rate equal to the average yield on Ninety-One-Day, Thirteen-Week Treasury Bills as established in the weekly auction by the Department of Treasury. Interest shall be paid on the average weekly amount of Your negative balance. If You have a substantial negative balance so that Your cash flow is affected, and if Prime agrees, You may convert some or all of that negative balance to periodic payments to Prime (the "Advance"). In that event You and Prime shall agree on the frequency of payments and You agree to pay to Prime interest on the Advance at the rate of 12% per annum. Provided, however, in the event the Prime Rate (of U. S. money center commercial banks as published in The Wall Street Journal) shall equal or exceed 10%, You agree to pay to Prime interest on the Advance at the Prime Rate plus 2%.

20. FREIGHT BILLS AND TARIFFS. Prime shall provide You with a copy of Prime's rated freight bill or a computer-generated document containing the same information, and, upon request, You shall have the right to examine Prime's tariffs at all reasonable times, as well as documents from which contract rates and charges are computed. Mileage is

based on the latest version of the Household Goods Carrier's Bureau Mileage Guide, unless otherwise specified by Prime's customers.

21. PRIME'S SERVICES, PRODUCTS AND EQUIPMENT. You shall not be required to purchase or rent any products, equipment or services from Prime as a condition of entering into this Agreement. In the event that You elect to purchase or rent any products, equipment or services from or through Prime, You agree that Prime may deduct amounts due for such products, equipment or services from the compensation due You. You and Prime agree that such amounts will include the cost of such products, equipment or services and may include amounts to cover Prime's administrative costs, either direct or indirect, of securing, offering and maintaining such products, equipment and services.

22. TERMINATION. Either party may terminate this Agreement by giving thirty (30) days' written notice of such intention to the other party. In the event either party commits a material breach of this Agreement, the other shall have the right to terminate this Agreement by giving five (5) days' written notice of such intention. Shipping requirements of Prime's customers are an essential part of Prime's business, and failure to adhere to such requirements may be deemed to be a material breach of this Agreement. The DOT has charged Prime with the duty of requiring You to observe safety standards while operating the Equipment under Prime's authority. It is agreed that Prime may terminate this Agreement immediately if it has information or knowledge or belief that the safety of the public is being endangered by You or Your agents or employees in the operation of the Equipment. In the event

this Agreement is terminated by either party or upon the expiration of this Agreement, You shall, within forty-eight (48) hours, return all of Prime's property to Prime at a location specifically designated by Prime. If You shall fail to return Prime's property as provided herein, You shall be responsible for all expenses incurred by Prime in securing the proper return of said property. Such expenses may be charged back against any amounts owed You by Prime.

23. NOTICES. All notices, requests, instructions, consents and other communications to be given pursuant to this Agreement shall be in writing and shall be deemed received (i) on the same day if delivered in person, by same day courier or by telegraph, telex or facsimile transmission; (ii) on the next day if delivered by overnight mail or courier; or (iii) on the date indicated on the return receipt, or if there is no such receipt, on the third calendar day (excluding Sundays) if delivered by certified or registered mail, postage prepaid, to the party for whom intended to the following addresses:

If to Prime:	Manager, Contractor Relations P.O. Box 4208 Springfield, MO 65808
If to Contractor:	HALLMARK TRUCKING LLC 1125 BARBOUR AVENUE PORT CHARLOTTE FL 33948

Each party may, by written notice given to the other in accordance with this Agreement, change the address to which notices to such party are to be delivered.

24. RELATIONSHIP OF PARTIES. The parties intend to create by this Agreement the relationship of Carrier and Independent Contractor and not an

employer/employee relationship. You are and shall be deemed for all purposes to be an Independent Contractor, not an employee of Prime. Neither You, Your employees, agents or servants, if any, are to be considered employees of Prime at any time, under any circumstance or for any purpose.

25. ASSIGNMENT. You shall not assign this Agreement or any rights or obligations hereunder to anyone without the written consent of Prime.

26. DESIGNATION OF PAYEE. You agree that, in the event there is more than one (1) individual named as the Contractor on the face page of this Agreement, that those persons so named will designate in writing which one of them shall be entitled to receive the weekly Settlement check due under the terms of this Agreement. Any change in such designation must be in writing and must be executed by all individuals named as Contractor herein. The purpose of this paragraph is to allow Prime to make one (1) Settlement check payable to one (1) of the individuals named as Contractor without retaining any exposure whatsoever for payment to the other named Contractor.

The following named Co-Contractor is hereby designated as the individual to receive all weekly Settlement checks in this name only:

APPROVED: _____

_____

27. MODIFICATION OF SCHEDULES. From time to time during the term of this Agreement amounts required to purchase insurance from a Prime affiliate or through Prime, lease or purchase payments, reserve account requirements, Qualcomm user fees and other like items may be changed from

those amounts set forth on the Schedules attached hereto by the person making such charges. In such event and upon receipt in writing of notice of such modification by Prime from the person making the modification, Prime shall notify You in writing of such change. Unless You instruct Prime in writing to the contrary within ten (10) days of the date of Prime's notice to You, the appropriate Schedule shall be deemed modified to reflect the new amount being charged and the Schedule shall be deemed by the parties as being amended accordingly.

28. SET-OFF. You hereby grant to Prime the right of immediate set off against Your weekly Settlement of all amounts due from You to Prime under the terms of this Agreement.

29. LEASE EXPENSES ADVANCES. If You lease Your Tractor from Success Leasing, Inc. ("Success"), Your Lease contains financial obligations in addition] to Lease Charges, Excess Mileage Charge and Tire Replacement Reserve. Those additional obligations are found in paragraphs 10, 12, 14, 15, 17 and 19(d) of Your Lease. Those obligations may be advanced by Success or Prime on Your behalf. In the event they are, You hereby authorize Prime to deduct from Your Settlement or Your Performance Bond amounts equal to such advances and remit to the entity which made the advance. The amount deducted shall be the actual cost, of each such obligation.

30. GOVERNING LAW AND ARBITRATION. THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF THE STATE OF MISSOURI. ANY DISPUTES ARISING UNDER, ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING AN ALLEGATION OF BREACH

THEREOF, AND ANY DISPUTES ARISING OUT OF OR RELATING TO THE RELATIONSHIP CREATED BY THE AGREEMENT, AND ANY DISPUTES AS TO THE RIGHTS AND OBLIGATIONS OF THE PARTIES, INCLUDING THE ARBITRABILITY OF DISPUTES BETWEEN THE PARTIES, SHALL BE FULLY RESOLVED BY ARBITRATION IN ACCORDANCE WITH MISSOURI'S ARBITRATION ACT AND/OR THE FEDERAL ARBITRATION ACT. ANY ARBITRATION BETWEEN THE PARTIES WILL BE GOVERNED BY THE COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION (THE "RULES"). THE PARTIES SPECIFICALLY AGREE THAT NO DISPUTE MAY BE JOINED WITH THE DISPUTE OF ANOTHER AND AGREE THAT CLASS ACTIONS UNDER THIS ARBITRATION PROVISION ARE PROHIBITED. IN THE EVENT OF CONFLICT BETWEEN THE RULES AND THE PROVISIONS OF THIS AGREEMENT, THE PROVISIONS OF THIS AGREEMENT SHALL CONTROL. EXCEPTIONS/CLARIFICATIONS OF THE RULES INCLUDE: (i) THE PROCEEDINGS SHALL BE CONDUCTED BY A SINGLE, NEUTRAL ARBITRATOR TO BE SELECTED BY THE PARTIES, OR, FAILING THAT, APPOINTED IN ACCORDANCE WITH THE RULES, (ii) THE SUBSTANTIVE LAW OF THE STATE OF MISSOURI SHALL APPLY, AND (iii) THE AWARD SHALL BE CONCLUSIVE AND BINDING. A DEMAND FOR ARBITRATION SHALL BE FILED NOT LATER THAN ONE (1) YEAR AFTER THE DISPUTE ARISES OR THE CLAIM ACCRUES, AND FAILURE TO FILE SAID DEMAND WITH THE ONE (1) YEAR PERIOD SHALL BE DEEMED

A FULL WAIVER OF THE CLAIM. THE PLACE OF THE ARBITRATION HEREIN SHALL BE SPRINGFIELD, MISSOURI. BOTH PARTIES AGREE TO BE FULLY AND FINALLY BOUND BY THE ARBITRATION AWARD, AND JUDGMENT MAY BE ENTERED ON THE AWARD IN ANY COURT HAVING JURISDICTION THEREOF. THE PARTIES AGREE THAT THE ARBITRATION FEES SHALL SPLIT BETWEEN THE PARTIES, UNLESS CONTRACTOR SHOWS THAT THE ARBITRATION FEES WILL IMPOSE A SUBSTANTIAL FINANCIAL HARDSHIP ON CONTRACTOR AS DETERMINED BY THE ARBITRATOR, IN WHICH EVENT PRIME WILL PAY THE ARBITRATION FEES.

31. ENTIRE AGREEMENT. This Agreement shall be comprised of this document executed below by You and Prime as well as all Schedules initialed by You (as amended from time to time as herein provided). Together they constitute the entire agreement between the parties hereto and may not be modified or amended except by written agreement executed by both parties or, in the case of the Schedules, as otherwise herein provided.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals on the day and year first written herein.

THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.

NEW PRIME, INC.

By:_____

"Prime"

_____

"Contractor"

By Your initials on this page You acknowledge receipt of a copy of this Agreement from Prime

_____

_____

"Co-Contractor"

INDEPENDENT CONTRACTOR OPERATING AGREEMENT
SCHEDULE 1
Reefer Division

PAYMENT

Payments made to You by Prime under paragraph 3 of the Agreement shall be as follows:

1. PERCENTAGE OF REVENUE. Prime shall pay You 72% of the line haul revenue received by Prime for freight transported by You. The phrase "line haul revenue" means all amounts paid by Prime's customers for transportation of freight exclusive of accessorial charges. Accessorial charges are charges made by Prime to the customer for goods and services in addition to freight transportation, including but not limited to such things as loading and unloading, special permits, pallets, tarp fees and shag fees. Not all accessorial charges will be designated by the customer as separate from the "line haul revenue", but shall be itemized by Prime on the freight bill as a separate charge and for purposes of this paragraph shall not be included in the "line haul revenue". Examples are the following charges that shall be deducted from "line haul revenue" when determining payment to You: (i) all pallets that are not provided or paid for by the customer shall be charged up to $5.00 per pallet per load; (ii) all amounts paid by Prime to You or a third party for loading and unloading in excess of that paid by the customer; and (iii) all amounts paid by Prime to You or a third party for tarp and shag fees in excess of that paid by the customer. Prime may make surcharges to some customers for fuel (tractor and/or refrigerated unit) or for liability and cargo insurance above the minimum required by law. When these surcharges are made,

they shall be so designated on Prime's freight bill and itemized as a separate charge. For purposes of this paragraph, such charges shall not be included in the "line haul revenue". In addition, all amounts paid by Prime to you for fuel surcharges (tractor and/or refrigerated unit) in excess of that paid by customer will be deducted from linehaul. All fuel surcharges collected from customer in excess of amounts paid to you by Prime shall be added to linehaul.

2. REVENUE AVERAGING. Subject to the terms, conditions and limitations contained in the Agreement, You shall receive no less than $1.02 per authorized dispatched mile while operating the truck. Revenue paid to You shall be reconciled every 100,000 authorized dispatched miles. If revenue paid You at any time during the reconciliation period averages below $1.02 per mile while operating the truck Prime shall make advances to You sufficient to bring Your average revenue up to the stated minimum. Thereafter, if your revenue increases sufficiently so as to average in excess of the stated minimum, Prime will be entitled to recover from You that portion of such advances that caused Your revenue to average above the stated minimum, and You authorize Prime to deduct such amount from Your Settlement.

3. RECOVERY UPON TERMINATION. If You terminate this Agreement prior to the end of any single reconciliation period, and You have averaged less than $1.02 per authorized dispatched mile while operating the truck, but have received advances up to that amount, You agree to repay Prime the difference between the actual average rate per mile and $1.02 per mile while operating the truck and agree that

such amount may be deducted from Your security deposit.

4. EQUIPMENT. You agree to furnish Your own tools and equipment necessary for Your operations including, but not limited to, a pulp thermometer, two load locks, a trailer security lock approved by Prime, wrenches sufficient to adjust tractor and trailer brake assemblies, fire extinguisher, flashlight, and a minimum of three reflective/warning highway triangles.

NEW PRIME, INC.

By: _____

Date: _____ _____

"Prime"

_____

Date: _____ _____

"Contractor"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DOMINIC OLIVEIRA, on his own behalf and on behalf of all others similarly situated,

Plaintiff,

v.

NEW PRIME, INC.

Defendant.

Civil Action No. 1:15-cv-10603-PBS

FIRST AMENDED COMPLAINT

Plaintiff, by and through his undersigned counsel, files this Class and Collective Action First Amended Complaint for unpaid wages against the above-listed Defendant.

This amendment is by right pursuant to F.R.C.P. 15(a)(1)(B).

STATEMENT OF THE CASE

1. Plaintiff Dominic Oliveira and those similarly situated are currently, or were formerly, employed by Defendant New Prime, Inc. ("New Prime") and, in many weeks, were paid less than minimum wage for each hour of work.

2. Plaintiff Oliveira and those similarly situated were directed to do training sessions for which they received no pay, both at the beginning of New Prime's "Paid Apprenticeship" program and before

becoming either a company or independent contractor driver.

3. Because the Defendant paid the Plaintiff and those similarly situated, including employees labeled as trainees or independent contractors, by the mile but did not compensate for other on duty time, the Plaintiff and those similarly situated were not paid statutory minimum wage.

4. The Defendant violated the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., and Missouri statutes related to wages and hours by failing to pay minimum wage for all hours worked in each workweek when due.

5. The Defendant's violations of the Fair Labor Standards Act and Missouri and Maine's labor laws were willful, malicious and deliberate.

6. Plaintiff Oliveira seeks compensation for the Defendant's violations of the Fair Labor Standards Act and Missouri's and Maine's minimum wage laws, on his own behalf and on behalf of all other similarly situated current and former employees (including those employees misclassified as independent contractors) of Defendant.

PARTIES, JURISDICTION, AND VENUE

7. Plaintiff Oliveira recently moved his permanent residency from Maine to Florida. At various times throughout his employment (as both a standard employee and as an employee misclassified as an independent contractor) Plaintiff Oliveira was a resident of Worcester County, Massachusetts.

8. Plaintiff Oliveira was employed by the Defendant at various times from approximately March 2013 through approximately June 2014.

9. Plaintiff Oliveira was employed by the Defendant New Prime, though classified as an independent contractor, from approximately May 2013 through approximately June 2014, and he was labeled an employee again for a brief period in the fall of 2014.

10. Plaintiff Oliveira's FLSA Consent to Sue is annexed hereto as Exhibit 1.

11. Defendant New Prime is a registered Missouri business corporation with a principal business address of 2740 North Mayfair, Springfield, MO 65803. At all relevant times, Defendant New Prime was doing business in the Commonwealth of Massachusetts.

12. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1331 because this case arises under the laws of the United States. Specifically, this action arises under the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq.

13. Plaintiff requests that this Court exercise supplemental jurisdiction over their claims under the laws of Missouri and Maine, pursuant to 28 U.S.C. § 1367.

14. Venue is proper pursuant to 28 U.S.C. § 1391(b)(2): the Plaintiff was permanently domiciled in Massachusetts when he was first employed, at various times while working for the Defendant he was in Massachusetts, and the Defendant conducts substantial business in the Commonwealth of Massachusetts.

FACTUAL ALLEGATIONS RELEVANT TO ALL CLAIMS

15. Defendant New Prime hired Plaintiff Oliveira and all others similarly situated as employees or employees misclassified as independent contractors.

16. Defendant New Prime has over $500,000 in gross receipts per year.

17. Defendant New Prime hired Plaintiff Oliveira and all others similarly situated to transport goods in interstate commerce.

18. Defendant New Prime employed two or more people, including the named Plaintiff, to handle and work on materials that move in interstate commerce.

DEFENDANT NEW PRIME FAILS TO PAY FOR TIME SPENT TRAINING

19. New Prime conducts a "Paid Apprenticeship CDL training" to train new drivers but also to get the benefit of their labor. Prime advertises this program as "On-the-Job" Truck Driver Training Program. Student Truck Driver Program, annexed hereto as exhibit 2, Paid Apprenticeship CDL Training, annexed hereto as exhibit 3.

20. New Prime tells the potential apprentices they won't have to pay tuition if they stay with New Prime for a year as either employee drivers or contractors.

21. The whole purpose of the tuition forgiveness plan after a year of service to New Prime is to make clear to the apprentices that there will be a position available when they finish, and also to make it economically difficult for the apprentices to not accept

this position. Further, New Prime employees reassure the potential apprentices that they will have a position at the end of the program, barring unforeseen circumstances.

22. But even within the training program's structure, potential apprentices are promised a temporary spot on the payroll as B2 trainee drivers after about four weeks when they pass the CDL test, and therefore the apprentices understand that they will receive wages when they sign up for this paid apprenticeship.

23. After a serious application process, apprentices selected for the program attend a four-day orientation at New Prime's facility in Missouri.

24. The apprentices then drive with a New Prime driver for three to four weeks for a total of 10,000 miles. The drivers receive an advance of $200 per week for food that they are required to repay, but otherwise receive no remuneration.

25. Under U.S. Department of Transportation regulations drivers' driving time and non-driving "on duty" time are strictly regulated. A New Prime instructor driver must count his time supervising a trainee driver as on duty time but it does not count against driving time. A driver alone can only drive for 11 hours of his 14 hour period. But when he can use his extra duty hours to supervise a student he can often keep the truck moving for the entire period.

26. Because New Prime is able to move loads faster with these extra student drivers, it profits from their labor, and effectively replaces the work that other paid drivers would do with the work of these trainees.

27. In the third phase of the program the driver takes the CDL exam and then completes 30,000 miles as a "B2" company driver trainee. The drivers are paid wages of 14 cents per mile driven without regard to other compensable work time.

28. After this, employees take more orientation classes, and are then classified as either company drivers or independent contractors. Drivers receive a $100 bonus to become independent contractors. The orientations take about a week and are unpaid. This is a different orientation than at the beginning of the apprenticeship program.

DEFENDANT NEW PRIME ROUTINELY FAILS TO PAY MINIMUM WAGE TO TRAINEES

29. Plaintiff Oliveira entered the apprenticeship program in March of 2013.

30. Plaintiff Oliveira and the other apprentices were not paid for time spent in orientation either at the beginning of the program, or when before they started as company drivers or mislabeled independent contractors.

31. Plaintiff Oliveira and other employees similarly situated drove trucks and moved cargo in interstate commerce for New Prime.

32. Plaintiff Oliveira and other employees similarly situated delivered cargo as directed by New Prime.

33. In this period, Plaintiff Oliveira routinely worked many hours driving hundreds and often thousands of miles. He was often required to assist a second driver and/or alternate driving time. For all time he was in a New Prime truck he was either driving or otherwise working for New Prime in some

capacity. Because he was away from his home on company duty and responsible for the company's property, he was working most of the time while dispatched.

34. New Prime's website for prospective apprentices says: "During your training period, you can expect to be out four to six weeks at a time. Once you complete training and upgrade to a solo company driver, you can expect to be out 3 to 4 weeks at a time (depending upon where you live), with a day off for every week you are out." Exh. 3.

35. Plaintiff Oliveira's pay was often reduced with deductions, including the $25 deduction to pay back the $200 advances from the first training period. Plaintiff Oliveira also received travel allowances. New Prime did not make employment tax deductions on this money, presumably because it covered expenses for the benefit of the employer, and therefore the allowances cannot be considered wages. *See* Drivers Payroll Recap dated 4/17/13, annexed hereto as exhibit 4.

36. On multiple occasions, despite working continuous tours of duty for entire weeks and driving thousands of miles, Plaintiff Oliveira was compensated less than minimum wage by New Prime.

37. Because of the nature of long haul trucking, Plaintiff Oliveira spent almost all of his time doing compensable work for New Prime. This included loading and unloading, protecting the company property, and doing many other tasks for New Prime's benefit away from his home. But New Prime only paid for those hours when the truck was actually moving.

38. Examples from the Plaintiff's employment records show that he was often not paid minimum wage.

a. for the week of April 17, 2013, Plaintiff Oliveira was paid for 6156 miles over a period of 8 days and had net wages, after deductions, of $482.85. It would only take 66.6 hours of work at the FLSA minimum to reach $482.85. Even just counting the time while the truck was moving at a generous speed of 65 miles per hour, Plaintiff Oliveira must have worked at least 94.71 hours. Exh. 4.

b. for the week of May 1, 2013, Plaintiff Oliveira was paid for 5653 miles over a period of 7 days and had net wages, after deductions, of $441.36. It would only take 60.9 hours of work at the FLSA minimum wage to reach $441.36. Even just counting the time while the truck was moving at a generous speed of 65 miles per hour, Plaintiff Oliveira worked at least 86.97 hours. Drivers Payroll Recap dated 5/01/13, annexed hereto as exhibit 5;

39. As described above, New Prime paid Plaintiff Oliveira on a per mile basis that often failed to bring his pay to the statutory minimum wage for each hour worked. New Prime paid other employee drivers similarly situated to Plaintiff Oliveira on a per mile basis and upon information and belief this often failed to bring their pay to the statutory minimum wage for each hour worked.

40. Defendant New Prime made unjustified deductions from the paychecks of Plaintiff Oliveira. Upon information and belief, Defendant New Prime made identical or similar deductions from the paychecks of other employees similarly situated to Plaintiff Oliveira. In many weeks these deductions brought the pay of Plaintiff Oliveira and those similarly situated under the statutory minimum wage for each hour worked.

DEFENDANT NEW PRIME MISCLASSIFIES EMPLOYEES AS INDEPENDENT CONTRACTORS

41. After working as a trainee employee driver for New Prime in the Apprenticeship program, representatives of New Prime told Plaintiff Oliveira that he could make more money driving as an independent contractor than he could as an employee driver. Upon information and belief, New Prime representatives made similar promises to others similarly situated as Plaintiff Oliveira.

42. When he returned from his trainee driving, New Prime put him up in their hotel and fed him in his cafeteria while they walked him through the process of becoming an independent contractor driver.

43. First Plaintiff Oliveira was told pick three names for a new LLC. He was directed to go to a company on the second floor of New Prime's building called Abacus Accounting. They had him fill out a form and with his suggested names in ranked order and told him that they proceeded to create the LLC called Hallmark Trucking which was ready the next day.

44. He was then instructed to go to Success Leasing on the first floor of New Prime's building to

look for a truck. Upon information and belief, Success Leasing is a closely related corporation to New Prime.

45. After selecting a truck, the Plaintiff was handed a pile of papers including documents for New Prime and Success and encouraged to sign and initial highlighted portions quickly so that he could get on the road. He was given no ability to negotiate these contracts except that he was later permitted to look for problems with the truck that would be fixed in the service center before he left. He felt pressure to complete this quickly because his load was waiting.

46. The Plaintiff was then instructed to go to the New Prime company store to buy security locks for his truck. He was also charged at the "fuel isle," where New Prime fuels and equips trucks, for all of the additional tools of the trade that added up to around $5000. This was then deducted at $75 per week.

47. The Plaintiff was not paid for his time setting up the LLC, selecting a truck, and equipping the truck, all of which were done under New Prime's direction. Upon information and belief similarly situated misclassified independent contractors were also not paid for this time.

48. Plaintiff Oliveira's job responsibilities driving while labeled as an independent contractor for New Prime were substantially identical to his job responsibilities as a New Prime employee driver.

49. Upon information and belief, others similarly situated to Plaintiff Oliveira, that were labeled as independent contractors, had job responsibilities

substantially identical to the job responsibilities of employee drivers working for New Prime.

50. Defendant New Prime exercised operational and actual control over Plaintiff Oliveira and others similarly situated under similar, if not substantially identical, agreements through, among other things, either directly or indirectly controlling drivers' scheduling, vacations, home time, requiring drivers to take New Prime training courses and follow New Prime procedures, effectively requiring that drivers take certain shipments, and rendering drivers unable to work for other trucking and/or shipping companies. Because of the structure of lease payments, the drivers have no choice but to take shipments as directed by New Prime or they would quickly fall into default. The drivers bought insurance through a New Prime affiliated company.

51. These drivers perform the essential function of New Prime's transport business, New Prime has the ability to hire and fire them, New Prime controlled the manner and rate of pay, kept all pay records, and effectively controlled their schedule through its dispatch and QUALCOMM system. Upon information and belief, this QUALCOMM system could not easily be adapted to other carriers, and at least in the short term the drivers had no choice but to take New Prime loads. Because the drivers had no ability to work for other companies in the short term, and the lease payments were due regardless of what they did, they had no choice but to follow New Prime's dictates in the same manner as any employee.

DEFENDANT NEW PRIME INTENTIONALLY AND UNLAWFULLY FAILS TO PAY PLAINTIFF OLIVEIRA STATUTORY

MINIMUM WAGES WHILE MISLABELED AS AN INDEPENDENT CONTRACTOR

52. While Plaintiff Oliveira was an employee of New Prime and misclassified as an independent contractor, New Prime often failed to pay Plaintiff Oliveira the statutory minimum wage. For example:

a. for the week of June 12, 2013, Plaintiff Oliveira was supposed to be paid for 1373 miles but after unjustified deductions, his pay was negative $296.48. Since he obviously worked many hours to drive over a thousand miles, the negative pay is a violation of both the FLSA and Missouri wage laws. Exh. 6;

b. for the week of July 17, 2013, Plaintiff Oliveira was supposed to be paid for 1517 miles, but after deductions his pay was negative $387.59. Since he obviously worked many hours to drive over a 1500 miles, the negative pay is a violation of both the FLSA and Missouri wage laws. Exh. 7;

c. for the week of June 4, 2014 Plaintiff Oliveira was supposed to be paid for 1040 miles, but after deductions his pay was negative $121.69. Exh. 8;

d. for the week of July 16, 2014 Plaintiff Oliveira was paid for 874 miles but after deductions that appear to be for the benefit of the employer his net pay was only $9.83. Again he wasn't paid close to the minimum wage for that time. Exh. 9;

e. for the week of July 30, 2014, Plaintiff Oliveira was paid for 2161 miles but after deductions his pay was negative $323.99. Because he was paid a negative amount he was obviously not paid minimum wage for all of his time, including at least 33 hours of actual driving. Exh. 10.

53. Defendant New Prime made unjustified, unpredictable, and poorly explained deductions from the paychecks of Plaintiff Oliveira. These deductions were often for items that are the tools of the trade or otherwise for the employer's benefit. Upon information and belief, Defendant New Prime made similar or identical deductions from the paychecks of employees including those misclassified as independent contractors similarly situated to Plaintiff Oliveira.

54. In many weeks while Plaintiff Oliveira was an employee of Defendant New Prime, Defendant New Prime intentionally and unlawfully paid Plaintiff Oliveira and all others similarly situated an amount less than the statutory minimum wage for each hour of work.

DEFENDANT NEW PRIME EMPLOYED THE PLAINTIFF AS A COMPANY DRIVER AND AGAIN FAILED TO PAY MINIMUM WAGE

55. Plaintiff Oliveira grew frustrated that the amount of pay and time off was not as great as he was led to believe and quit the on or around the end of September 2014.

56. In October of 2014 New Prime rehired Plaintiff Oliveira as a company driver. As a condition of employment he agreed that New Prime could de-

duct money from his checks to pay an alleged debt to Success Leasing.

57. During this period he was based out of his home in Maine and made shorter regional trips from the Wal-Mart distributor.

58. Defendant New Prime intentionally and unlawfully made significant deductions from pay that Defendant New Prime owed Plaintiff Oliveira upon the termination of his employment. Upon information and belief, New Prime made similar deductions from the pay of others similarly situated as Plaintiff Oliveira upon the termination of their employment.

59. Specifically during the week of November 26, 2014, Plaintiff Oliveira was paid for 1104 miles over a period of 8 days and had net wages, after deductions, of $55.94. While a $14 wage advance was probably a legal deduction, the other deductions were unwarranted. In order to drive the 1104 miles he had to have worked well in excess of 8 hours that would yield minimum wage. Exh. 11. Even just driving at 65 miles per hour without counting the rest of the compensable time, it would take approximately 17 hours to drive 1104 miles.

60. Therefore during that week, the Plaintiff was not paid minimum wage under the FLSA, Missouri, or Maine law.

61. Upon information and belief, the Defendant makes significant unlawful deductions from the paychecks of many employees including those misclassified as independent contractors in their last paycheck to cover costs that should be borne by the employer.

62. These deductions bring the pay below minimum wage for each hour worked.

63. The Plaintiff incorporates Exhibits 1-11 into his complaint. Exhibits 2 and 3 are excerpts from the Defendant's webpage. Exhibits 4-11 are New Prime's business records provided to Plaintiff's counsel by Defense counsel.

216(b) COLLECTIVE ACTION ALLEGATIONS

64. Plaintiff Oliveira asserts his Count I claim under the FLSA, pursuant to 29 U.S.C. § 216(b), on behalf of himself and on behalf of all other similarly situated employees currently and formerly employed by Defendants.

65. Pending any modifications necessitated by discovery, the named Plaintiff preliminarily defines the following classes:

216(b) Class: ALL CURRENT AND FORMER EMPLOYEES THAT DROVE FOR THE DEFENDANT, WHETHER OR NOT CATAGORIZED AS EMPLOYEES, TRAINEES, OR INDEPENDENT CONTRACTORS WHO WERE NOT COMPENSATED FOR ALL TRAINING TIME, PAID BY THE MILE WITHOUT REGARD TO HOURS WORKED AND/OR HAD IMPROPER DEDUCTIONS TAKEN FROM THEIR PAYCHECKS

66. All potential 216(b) Class members are similarly situated because, among other things, they were all employees of Defendant and, upon information and belief, all suffered from the same policies of Defendant, including:

a. They were not paid for all training time;

b. They were paid by the mile without regard to the number of hours worked;

c. They each suffered from improperly made deductions from class members' paychecks; and

d. Defendant New Prime failed to pay class members at least statutory minimum wage for each hour of work as mandated by the FLSA.

RULE 23 CLASS ACTION ALLEGATIONS

67. The named Plaintiff asserts his Counts II - III claims as a Fed. R. Civ. P. 23 class action on their own behalf and on behalf of a class for which Plaintiff seeks certification.

68. Pending any modifications necessitated by discovery, the named Plaintiff preliminarily defines the following classes:

Minimum Wage Class: ALL CURRENT AND FORMER EMPLOYEES THAT DROVE FOR THE DEFENDANT, WHETHER OR NOT CATAGORIZED AS EMPLOYEES, TRAINEES, OR INDEPENDENT CONTRACTORS WHO WERE NOT COMPENSATED FOR ALL TRAINING TIME, PAID BY THE MILE WITHOUT REGARD TO HOURS WORKED AND/OR HAD IMPROPER DEDUCTIONS TAKEN FROM THEIR PAYCHECKS

69. Upon information and belief, Defendant New Prime did not pay the putative Minimum Wage Class members the statutory minimum wage for all hours of work in many workweeks.

70. The class is so numerous that joinder of all potential class members is impracticable. Plaintiffs

do not know the exact size of the class since that information is within the control of Defendants.

71. The named Plaintiff estimates that there are thousands of similarly situated people. Defendant New Prime operates nationally and hires individuals, as both employees and "independent contractors," from the entirety of the continental United States.

72. Based on the number of employees (and employees misclassified as independent contractors) and the national range of Defendant New Prime's business, the named Plaintiff therefore estimates that the class is made up of thousands of current and former employees (and former employees misclassified as independent contractors) of Defendant New Prime. The exact size of the class will be ascertainable from Defendant New Prime's records.

73. There are questions of law or fact common to the classes that predominate over any individual issues that might exist. Common questions of law and fact include: whether Defendants paid their employees (and employees misclassified as independent contractors) at least minimum wage; whether Defendant New Prime improperly failed to pay their former employees (and former employees misclassified as independent contractors) all wages due upon their termination.

74. The class claims asserted by the Plaintiff are typical of the claims of all of the potential class members. This is an uncomplicated case of unpaid wages that should be mathematically ascertainable from business and computer tracking records and the class claims are typical of those pursued by victims of these violations. A class action is superior to other available methods for the fair and efficient adjudica-

tion of this controversy because numerous identical lawsuits alleging similar or identical causes of action would not serve the interests of judicial economy.

75. The named Plaintiff will fairly and adequately protect and represent the interests of each class. He was both an employee misclassified as an independent contractor of Defendant New Prime and a standard correctly classified employee of Defendant New Prime and was a victim of the same violations of law as other class members, i.e., the failure to compensate employees (and employees misclassified as independent contractors) with the statutory minimum wage for each hour of work.

76. The named Plaintiff is represented by counsel experienced in wage and hour litigation and class actions.

77. The prosecution of separate actions by the individual potential class members would create a risk of inconsistent or varying adjudications with respect to individual potential Class Members that would establish incompatible standards of conduct for Defendants.

78. Each class member's claim is relatively small. Thus, the interest of potential class members in individually controlling the prosecution or defense of separate actions is slight. In addition, public policy supports the broad remedial purposes of class actions in general and the pertinent state laws are appropriate vehicles to vindicate the rights of those employees with small claims as part of the larger class.

79. The Plaintiff is unaware of any members of the putative classes who are interested in presenting their claims in a separate action.

80. The Plaintiff is unaware of any pending litigation commenced by members of any of the classes concerning the instant controversy.

81. It is desirable to concentrate this litigation in one forum.

82. This class action will not be difficult to manage due to the uniformity of claims among the class members and the susceptibility of wage and hour cases to both class litigation and the use of representative testimony and representative documentary evidence.

83. The contours of the class will be easily defined by reference to payroll documents Defendant New Prime was legally required to create and maintain, pursuant to FLSA and its regulations, including 29 C.F.R. § 516.2 along with truck log records and GPS data. Notice will be easily distributed as all members of the putative class are or were recently employed by Defendant New Prime, who was required to create and maintain records containing the mailing addresses of each such class member.

CLAIMS FOR RELIEF

COUNT I:
BREACH OF THE FAIR LABOR STANDARDS ACT (FLSA)

28 U.S.C. §§ 201 ET SEQ

84. The Plaintiff re-alleges and incorporates by reference all previous paragraphs of this Complaint as if fully rewritten herein.

85. The named Plaintiff asserts this claim on behalf of himself and the 216(b) Class pursuant to 29 U.S.C. § 216(b).

86. During all times relevant to this action, the named Plaintiff and all others similarly situated were employed by all Defendant as defined by 29 U.S.C. § 203(g).

87. The Defendant failed to pay the Plaintiff and the 216(b) Class the statutory minimum wage for each hour of work.

88. During all times relevant to this action, the named Plaintiff and all others similarly situated were employed by the Defendant in an "enterprise engaged in commerce or in the production of goods for commerce," as defined by 29 U.S.C. § 203(s)(1).

89. During all times relevant to this action, the named Plaintiff and all others similarly situated were employed by the Defendant for handling and otherwise working on goods or materials that had been moved in or were produced for commerce by any person.

90. The Defendant had annual gross revenues in excess of $500,000 and employed two or more persons, including the named Plaintiff, who handled and worked on materials which had been moved in interstate commerce.

91. The Plaintiff and all others similarly situated are individually covered by the Fair Labor Standards Act because they engaged in commerce or in the production of goods for commerce.

92. The Defendant failed to pay the Plaintiff and all others similarly situated the minimum wage required by the FLSA.

93. The Plaintiff and the 216(b) Class are entitled to unpaid minimum wage, liquidated damages,

and attorneys' fees and costs, pursuant to 29 U.S.C. § 216(b).

COUNT II:

BREACH OF MISSOURI MINIMUM WAGE LAW, MO. REV. STAT. § 290

94. Plaintiff incorporates all previous paragraphs.

95. The named Plaintiff asserts this claim on behalf of himself and the Minimum Wage Class.

96. Plaintiff and those similarly situated are "employees" and Defendant New Prime is an "employer" as those terms are defined in Mo. Rev. Stat. § 290.500 et seq. (2014).

97. Defendant New Prime, in violation of Mo. Rev. Stat. § 290.502 (2014), failed to compensate the named Plaintiff and those similarly at the statutory minimum wage for each hour worked in many workweeks.

98. The Plaintiff and the Minimum Wage Class are entitled to unpaid minimum wage, liquidated damages, attorneys' fees and costs pursuant to Mo. Rev. Stat. § 290.527 (2014).

COUNT III:

BREACH OF CONTRACT OR UNJUST ENRICHMENT/QUASI-CONTRACT

99. The Plaintiff incorporates all previous paragraphs.

100. The Plaintiff asserts this claim on behalf of himself and all classes.

101. The Defendant entered into an employment agreement with the named Plaintiff and those similarly situated.

102. This agreement incorporated all applicable state and federal laws, including those setting a minimum wage in the several states.

103. The wage term in the contract is illegal and void. It must be replaced in quantum meruit at the reasonable value of the Plaintiff's labor, or alternatively, at minimum wage.

104. The Defendant breached this contract by failing to pay all wages due.

105. The Defendant owes damages in law and equity, or alternatively, must be disgorged from his ill-gotten gains.

COUNT IV:

VIOLATIONS OF MAINE LABOR LAWS

106. The Plaintiff incorporates all previous paragraphs.

107. The Plaintiff asserts this claim individually.

108. In the final period of employment, the Plaintiff was employed in Maine.

109. He was not paid all wages due for this work.

110. He was not paid the statutory minimum wage in every week including his final paycheck.

111. He was not paid all wages due upon termination.

112. Therefore, he is entitled to actual and liquidated damages, statutory interest, and costs under Me. Rev. Stat. Ann. tit. 26, §7-621-A, §7-626, §7-626-A, and §7-663 -§7-670.

DEMAND FOR JURY TRIAL

The Plaintiff demands a jury for all issues so triable.

PRAYER FOR RELIEF

Plaintiff respectfully requests that this Court enter an order or orders:

a. Certifying an opt-in class pursuant to the FLSA, 29 U.S.C. §§ 201 et seq.;

b. That appropriate notice of this suit and the opportunity to opt into it be provided to all potential members of the 216(b) Class;

c. Awarding the Plaintiff and the 216(b) Class unpaid minimum wage, pursuant to 29 U.S.C. §§ 206 and 216;

d. Awarding the Plaintiff and the 216(b) Class costs and attorneys' fees pursuant to 29 U.S.C. § 216(b);

e. That the court certify this as action as a class action under Rule 23(b)(1), 23(b)(2) and 23(b)(3);

f. That appropriate notice of this suit be provided to all potential members of the Minimum Wage Class;

g. Awarding the named Plaintiff and the Minimum Wage Class damages, liquidated damages and penalties pursuant to Missouri Statutes §§ 290.505 and 290.527 and any other statutory damages available to former employees under § 290.110 or otherwise;

h. Awarding the named Plaintiff, the 216(b) Class and the Minimum Wage Class, punitive damages;

i. Awarding the named Plaintiff and the Minimum Wage Class, damages for the breach of contract or unjust enrichment;

j. Awarding the Plaintiff actual and liquidated damages, statutory interest, and costs under M.R.S. Title 26 §§ 621, 626, 626A, and 664-70; and

k. Granting such other relief as this Court deems just and proper.

Respectfully Submitted,

/s/ Andrew S. Schmidt
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Admitted *pro hac vice*
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Dated: July 6, 2015

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2015, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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/s/ Andrew Schmidt

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DOMINIC OLIVEIRA, *Plaintiff* v. NEW PRIME, INC., *Defendant*	Civil Action No. 15-10603-PBS

MEMORANDUM AND ORDER

October 26, 2015

Saris, C.J.

INTRODUCTION

This case involves a labor dispute between a trucking corporation and a former truck driver. In March 2015, the plaintiff Dominic Oliveira brought this proposed class action alleging that the defendant New Prime, Inc. violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq., and Missouri and Maine labor laws, by failing to pay its truck drivers minimum wage (Docket Nos. 1, 33). New Prime moved to compel arbitration under § 4 of the Federal Arbitration Act (FAA), 9 U.S.C. § 4, and two operating agreements signed by Oliveira on behalf of Hallmark Trucking LLC, both of which contain an arbitration clause (Docket No. 35). Oliveira argues that the Court must determine whether the operat-

ing agreements are exempt from arbitration under § 1 of the FAA before it can consider New Prime's motion to compel arbitration (Docket No. 40). New Prime maintains that the exemption's application is a threshold question of arbitrability that the parties delegated to the arbitrator in the operating agreements (Docket No. 51). After hearing, I agree that it is for the Court, and not the arbitrator, to decide whether the § 1 exemption applies before considering the motion. The motion to compel arbitration is therefore **DENIED** without prejudice.[1]

FACTUAL BACKGROUND

The following facts are taken from the First Amended Complaint (Docket No. 33) and the operating agreements referenced by all parties (Docket No. 36, Ex. A, Ex. B). In March 2013, Plaintiff Dominic Oliveira entered Defendant New Prime's "Paid Apprenticeship" training program, which is advertised as an on-the-job training program for new truck drivers. Docket No. 33, Ex. 2, Ex. 3. Apprentices first obtain a Missouri Commercial Driver's License (CDL) permit. They next shadow New Prime drivers for three to four weeks and drive 10,000 miles under supervision. During this time, apprentices receive an

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[1] Alternatively, New Prime argues that the Court should dismiss the case for improper venue because the arbitration clause states that arbitration is to take place in Missouri. If the case remains in this Court and moves forward, New Prime moves to dismiss Oliveira's breach of contract/unjust enrichment claim (Count 3), arguing that it is preempted by the FLSA and the Federal Aviation Administration Authorization Act. The Court will not address these issues until the threshold issue of exemption is resolved.

advance of $200 per week, which is subtracted from their future earnings, but otherwise receive no remuneration. As a result, apprentices are essentially free labor while they train with New Prime. Under Department of Transportation regulations, trucks can be on the road for longer periods of time when a New Prime driver switches off with an apprentice.

After completion of this on-the-road instruction, apprentices take a CDL exam and then work as a "B2" company driver trainee for 30,000 miles. During this period, the trainees earn fourteen cents per mile driven, but are not paid for time spent loading and unloading cargo or protecting company property. The company also regularly deducts money from paychecks, including the $200 weekly advance from the apprenticeship program. As a result of these deductions, Oliveira received approximately $440-$480 per week for driving 5,000-6,000 miles, which equates to about $4/hour while driving.

Finally, after completing the 30,000 miles as a B2 company driver trainee, the truck drivers complete additional orientation classes, which last for about a week. They are then classified as either company drivers or independent contractors. The truck drivers are not paid for the time spent in the orientation classes, and receive a $100 bonus if they opt to become independent contractors.

In May 2013, when Oliveira returned from his trainee driving, New Prime told Oliveira that he could make more money if he became an independent contractor. New Prime directed him to a company called Abacus Accounting, which was located on the second floor of New Prime's building. Abacus Accounting told Oliveira to provide suggested names for a limited liability company (LLC), and then created

Hallmark Trucking LLC on his behalf. New Prime also directed Oliveira to Success Leasing, a closely related corporation to New Prime, to select a truck.

At Success Leasing, Oliveira was given several documents to sign. One of these documents was titled "INDEPENDENT CONTRACTOR OPERATING AGREEMENT," which repeatedly states that the intent of the agreement is to establish an independent contractor relationship between New Prime and Hallmark Trucking LLC. Docket No. 36, Ex. A, at 1, 9. The agreement also contains the following arbitration clause:

> GOVERNING LAW AND ARBITRATION. THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF MISSOURI. ANY DISPUTES ARISING UNDER, ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING AN ALLEGATION OF BREACH THEREOF, AND ANY DISPUTES ARISING OUT OF OR RELATING TO THE RELATIONSHIP CREATED BY THE AGREEMENT, AND ANY DISPUTES AS TO THE RIGHTS AND OBLIGATIONS OF THE PARTIES, INCLUDING THE ARBITRABILITY OF DISPUTES BETWEEN THE PARTIES, SHALL BE FULLY RESOLVED BY ARBITRATION IN ACCORDANCE WITH MISSOURI'S ARBITRATION ACT AND/OR THE FEDERAL ARBITRATION ACT . . . THE PARTIES SPECIFICALLY AGREE THAT NO DISPUTE MAY BE JOINED WITH THE DISPUTE OF ANOTHER AND AGREE THAT CLASS ACTIONS UNDER THIS ARBITRATION PROVISION ARE PROHIBITED . . . THE PLACE OF THE

ARBITRATION HEREIN SHALL BE SPRINGFIELD, MISSOURI.

Id. at 10. Oliveira "felt pressure" to sign quickly because New Prime had a load waiting for him outside. Docket No. 33, ¶ 45. Success Leasing then instructed Oliveira to go to the New Prime company store to purchase security locks, fuel, insurance, and other tools of the trade. These items totaled roughly $5,000, which New Prime then deducted from his paycheck at a rate of $75 per week.

Although New Prime labeled Oliveira an independent contractor in the operating agreement, his role as a truck driver for New Prime did not change from his time as an apprentice and trainee driver. New Prime continued to directly and indirectly control Oliveira's scheduling, vacations, and time at home by requiring him to take specific training courses and follow certain procedures. These courses and procedures limited which shipments he could take and made it difficult, if not impossible, for him to work for other trucking or shipping companies. In particular, New Prime dispatched drivers through a "QUALCOMM system" that was not adaptable to other carriers. Docket No. 33, ¶ 51.[2]

Meanwhile, New Prime continued to make regular deductions from Oliveira's paycheck, ostensibly because of lease payments on the truck and payments for the other tools that New Prime instructed him to buy. On several occasions, his weekly pay was negative after spending dozens of hours on the road. In March 2014, Oliveira signed a second contract ti-

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[2] The parties have not explained what the "QUALCOMM SYSTEM" is or how it works.

tled "INDEPENDENT CONTRACTOR OPERATING AGREEMENT" on behalf of Hallmark Trucking LLC, which contains an identical arbitration clause to that in the first agreement. Docket No. 36, Ex. B, at 1, 9-10. The second contract also repeatedly states that the agreement establishes an independent contractor relationship between New Prime and Hallmark Trucking LLC.

Oliveira terminated his contract with New Prime in September 2014. The next month, however, New Prime rehired him as a company driver on the condition that New Prime would continue deducting money from his paychecks to repay an alleged debt to Success Leasing. With these deductions, Oliveira again was paid below the minimum wage. He now brings this class action, arguing that he and other New Prime drivers were not paid the minimum wage under federal and state law.

DISCUSSION

I. Statutory Framework

Congress enacted the FAA in 1925 in "response to hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice." Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 111 (2001). To give effect to this purpose, § 2 of the FAA provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; see also Circuit City, 532 U.S. at 111. In short, § 2 "is a congressional declaration of a liberal federal policy favoring arbitration agreements." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); see also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S.

20, 25 (1991). "At a minimum, this policy requires that ambiguities as to the scope of the arbitration clause itself must be resolved in favor of arbitration." PowerShare, Inc. v. Syntel, Inc., 597 F.3d 10, 15 (1st Cir. 2010) (internal quotation marks and alterations omitted).

The Act provides two mechanisms through which federal courts may enforce § 2's liberal policy favoring arbitration. See Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 68 (2010). Section 3 instructs district courts to stay the trial of an action "upon any issue referable to arbitration under an agreement in writing for such arbitration" once the court is "satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement." 9 U.S.C. § 3. Section 4 allows any party "aggrieved" by the failure of another party "to arbitrate under a written agreement for arbitration" to petition a district court for "an order directing that such arbitration proceed in the manner provided for in such agreement." Id. § 4. The district court "shall" order arbitration upon being satisfied that "the making of the agreement for arbitration or the failure to comply therewith is not in issue." Id.

Despite the FAA's broad purpose and strong language, the Act does not extend to all arbitration agreements. Section 2 limits its application to contracts "evidencing a transaction involving commerce," or arising from a "maritime transaction." 9 U.S.C. § 2. More importantly for purposes of the present dispute, § 1, titled "exceptions to operation of title," states "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Id. § 1. Section 1 thus ex-

empts "contracts of employment of transportation workers" from the FAA entirely. Circuit City, 532 U.S. at 119. Employment contracts involving truck drivers fall within the transportation worker exception. See, e.g., Lenz v. Yellow Transp., Inc., 431 F.3d 348, 351 (8th Cir. 2005) (holding that a truck driver, but not a customer service representative, is a transportation worker under § 1); Harden v. Roadway Package Sys., Inc., 249 F.3d 1137, 1140 (9th Cir. 2001) (holding that a truck driver was exempt from the FAA under § 1); Am. Postal Workers Union v. United States Postal Serv., 823 F.2d 466, 473 (11th Cir. 1987) (noting that courts have limited the § 1 exemption to "workers actually engaged in interstate commerce, including bus drivers and truck drivers" (internal quotation marks omitted)).

The FAA does not define the term "contract of employment." See 9 U.S.C. § 1. Although neither the Supreme Court nor the First Circuit has directly addressed the issue, courts generally agree that the § 1 exemption does not extend to independent contractors. See, e.g., Carney v. JNJ Express, Inc., 10 F. Supp. 3d 848, 852-53 (W.D. Tenn. 2014) ("If the [plaintiffs] are independent contractors, their claims are arbitrable under the FAA."); Villalpando v. Transguard Ins. Co. of Am., 17 F. Supp. 3d 969, 982 (N.D. Cal. 2014) (same); Port Drivers Fed'n 18, Inc. v. All Saints, 757 F. Supp. 2d 463, 472 (D.N.J. 2011) (same); Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co., 288 F. Supp. 2d 1033, 1035-36 (D. Ariz. 2003) (same). This construction comports well with "the FAA's purpose of overcoming judicial hostility to arbitration," and the Supreme Court's instruction "that the § 1 exclusion provision be afforded a narrow construction" in light of that purpose. Circuit City, 532 U.S. at 118 (holding that § 1 only ex-

empts employment contracts of transportation workers from the FAA's reach, not all employment contracts).[3]

II. Analysis

Oliveira's relationship with New Prime can be divided into three periods of time: (1) March 2013 to May 2013, when Oliveira worked for New Prime through the apprenticeship program and as a B2 company driver trainee; (2) May 2013 to September 2014, when Oliveira worked for New Prime under the two operating agreements; and (3) post-October 2014, when New Prime rehired Oliveira as a company driver.[4] Under the statutory framework discussed above, the FAA's application to the present case hinges on whether Oliveira had a contract of employment or an independent contractor relationship with New Prime—and thus falls within or outside the § 1 transportation worker exemption— during each of these three time periods. New Prime appears to concede that Oliveira was an employee in the first and third time periods, and instead argues that the arbitration clause in the operating agreements should extend retroactively and prospectively to cover these intervals.

More specifically, New Prime maintains that Oliveira's claims from his time as an "employee driver" before signing the operating agreements, and after he was rehired as a company driver, fall within the scope of the arbitration clause for two reasons.

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[3] The parties do not dispute that Oliveira was a transportation worker under § 1.

[4] The parties do not specify when Oliveira's relationship with New Prime ended permanently.

Docket No. 51, at 7. First, Oliveira's "allegations related to his time as an employee are inextricably related to his decision to become an independent contractor and enter into the Agreements." Id. Next, New Prime contends that the arbitration clause "is very broad and clearly applies to 'any disputes as to the rights and obligations of the parties.'" Id. (quoting Docket No. 36, Ex. A, at 10, Ex. B, at 9-10). New Prime cites to Kristian v. Comcast Corp., 446 F.3d 25, 33-35 (1st Cir. 2006) for the proposition that an arbitration agreement can be applied retroactively if broadly phrased to include claims or disputes that arose prior to signing the agreement.[5]

At this stage in the proceeding, these arguments fail, because they do not address the applicability of the § 1 transportation worker exemption. If Oliveira was an employee in the first and third time periods, then the § 1 exemption applies and the Court cannot order the parties to arbitrate any claims that arose before Oliveira signed the operating agreements or after New Prime rehired Oliveira as a company driver in October 2014. That said, the parties dispute whether Oliveira was an employee or independent contractor during at least the second time period, and whether it is for the Court or the arbitrator to decide the threshold question of the FAA's applicability.

A. Gateway Questions of Arbitrability

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[5] New Prime does not cite, and the Court is not aware of, any cases in which a court applied an arbitration agreement to claims arising after termination of the contract containing the arbitration clause.

The Supreme Court has repeatedly emphasized that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942-43 (1995); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). Parties can agree to allow arbitrators decide "gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." Rent-A-Center, 561 U.S. at 68-69 (internal quotation marks and alterations omitted). "An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." Id. at 69. An agreement granting the arbitrator authority to decide threshold questions of arbitrability is generally referred to as a "delegation provision." See id. at 68.

Questions of arbitrability, however, are an exception to the federal policy favoring arbitration agreements. Howsam, 537 U.S. at 83; Kristian, 446 F.3d at 37-38. "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." First Options, 514 U.S. at 944 (internal quotation marks and alterations omitted); see also Howsam, 537 U.S. at 83 ("The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, *the question of arbitrability*, is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." (internal quotation marks and alterations omitted)). In short, courts

must enforce valid delegation provisions under the FAA, but courts scrutinize delegation clauses more closely to ensure the parties manifested a clear intent to delegate questions of arbitrability to the arbitrator.

Here, the parties do not contest that the two operating agreements Oliveira signed on behalf of Hallmark Trucking LLC contain valid delegation provisions. The contracts' arbitration clauses state in relevant part: "ANY DISPUTES AS TO THE RIGHTS AND OBLIGATIONS OF THE PARTIES, INCLUDING THE ARBITRABILITY OF DISPUTES BETWEEN THE PARTIES, SHALL BE FULLY RESOLVED BY ARBITRATION . . ." Docket No. 36, Ex. A, at 10, Ex. B, at 9-10 (emphasis added). Furthermore, as New Prime emphasizes, the arbitration clauses also incorporate the Commercial Arbitration Rules of the American Arbitration Association (AAA). Id. Ex. A, at 10, Ex. B, at 9-10 ("ANY ARBITRATION BETWEEN THE PARTIES WILL BE GOVERNED BY THE COMMERCIAL ABRITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION."). The Rules provide that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." Am. Arbitration Ass'n Commercial Arbitration R. & Mediation P. R-7(a). Thus, the parties have agreed to arbitrate gateway questions of arbitrability.

Oliveira argues that the arbitration clauses, including the delegation provisions, should not be enforced because the operating agreements are substantively and procedurally unconscionable. This ar-

gument fails, however, because Oliveira seeks to invalidate the contracts as a whole rather than the delegation provisions, or even the arbitration clauses, specifically. See Rent-A-Center, 561 U.S. at 72 ("Accordingly, unless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator."); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006) ("[A] challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.").

B. Applicability of the Transportation Worker Exemption

The delegation provisions and the AAA Rules do not resolve this matter, because they cannot, and do not, address whether the applicability of the § 1 transportation worker exemption is a question of arbitrability that parties can legally delegate to an arbitral forum in the first place. New Prime argues that the exemption's application is merely a gateway question of arbitrability that the parties delegated to the arbitrator. Oliveira maintains that "questions regarding statutory exemptions to arbitration agreements" under the FAA, including the § 1 exemption, are not questions of arbitrability at all, but a threshold matter that courts must resolve before considering a motion to compel. Docket No. 40, at 3.

Neither the First Circuit nor Supreme Court has answered the central question in this case: does a district court have to determine the applicability of the FAA § 1 exemption itself, or is the exemption issue just another gateway question of arbitrability that contracting parties may validly delegate to an

arbitrator? The Ninth Circuit has held that the "district court must make an antecedent determination that a contract is arbitrable under Section 1 of the FAA before ordering arbitration pursuant to Section 4." In re Van Dusen, 654 F.3d 838, 843 (9th Cir. 2011). Meanwhile, the Eighth Circuit has adopted the opposite viewpoint: it characterizes the applicability of the § 1 exemption as a "threshold question of arbitrability" that parties "can agree to have arbitrators decide." Green v. SuperShuttle Int'l, Inc., 653 F.3d 766, 769 (8th Cir. 2011). This Court finds the Ninth Circuit's analysis more persuasive and adopts its approach for the reasons that follow.

In Green v. SuperShuttle International, Inc., current and former airport shuttle bus drivers brought suit against SuperShuttle "alleging violations of the Minnesota Fair Labor Standards Act (MFLSA) arising from SuperShuttle's alleged misclassification of its drivers as franchisees rather than employees." Id. at 767. The bus drivers had all signed the same franchise agreement that contained both an arbitration clause and a delegation provision. Id. at 768. When SuperShuttle moved to compel arbitration under the agreement and § 4 of the FAA, Green—on behalf of all the drivers—argued that "the district court lacked jurisdiction to compel arbitration because the FAA exempts transportation workers." Id. at 768-69.

The Eight Circuit held that the application of the § 1 transportation worker exemption "is a threshold question of arbitrability in the dispute between Green and SuperShuttle." Id. at 769. The court emphasized that the franchise agreements "specifically incorporated the Rules of the American Arbitration Association (AAA)," which "provide that an arbitra-

tor has the power to determine his or her own jurisdiction over a controversy between the parties." Id. at 769. The court concluded that by incorporating the AAA Rules, "the parties agreed to allow the arbitrator determine threshold questions of arbitrability," and "thus the district court did not err in granting the motion to compel arbitration." Id.

In contrast, when faced with an analogous scenario, the Ninth Circuit analyzed whether the district court must assess the applicability of the § 1 exemption before ordering arbitration in detail. In In re Van Dusen, two interstate truck drivers entered "independent contractor operating agreements" with Swift Transportation Company. 654 F.3d at 840. The agreements contained both an arbitration clause and a delegation provision. Id. at 840-42. Despite these provisions, the plaintiffs filed suit against Swift and Interstate Equipment Leasing, Company in federal district court alleging violations of the FLSA and of California and New York labor laws. Id.

The In re Van Dusen defendants moved to compel arbitration pursuant to the arbitration clauses in the operating agreements, and the plaintiffs retorted that the contracts were exempt from arbitration under § 1 of the FAA. Id. The district court "declined to rule on the applicability of the exemption, holding that the question of whether an employer/employee relationship existed between the parties was a question for the arbitrator to decide in the first instance." Id. After the district court denied certification for an interlocutory appeal, the plaintiffs sought mandamus relief from the Ninth Circuit. Id.

The Ninth Circuit held[6] that the applicability of the § 1 transportation worker exemption is not a question of arbitrability that the parties may delegate to an arbitrator. Id. at 843-45. The court explained that because a "district court's authority to compel arbitration arises under Section 4 of the FAA," a district court "has no authority to compel arbitration under Section 4 where Section 1 exempts the underlying contract from the FAA's provisions." Id. at 843. "Section 4 has simply no applicability where Section 1 exempts a contract from the FAA, and private parties cannot, through the insertion of a delegation clause, confer authority upon a district court that Congress chose to withhold." Id. at 844. The court emphasized that "whatever the contracting parties may or may not have agreed upon is a distinct inquiry from whether the FAA confers authority on the district court to compel arbitration." Id.

As the Ninth Circuit highlighted, its holding is consistent with the Supreme Court's decision in Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956). See In re Van Dusen, 654 F.3d at 844 (citing Bernhardt, 350 U.S. at 201-02). In Bernhardt, the Supreme Court held that a district court lacked authority to stay litigation pending arbitration under § 3 of the FAA where the underlying contract containing the arbitration agreement did not evidence a "transaction involving commerce" within §§ 1 and 2 of the Act. Bernhardt, 350 U.S. at 201-02. The In re Van Dusen court concluded that this reasoning re-

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[6] Actually, the Ninth Circuit denied mandamus because the district court's decision was not clearly erroneous under the stringent standard for a writ of mandamus. Id. at 845-46.

garding the relationship between Sections 1, 2, and 3 of the Act "applies with equal force in interpreting the relationship between Sections 1, 2, and 4 of the FAA." In re Van Dusen, 654 F.3d at 844. Based on this analysis, this Court holds that the question of whether the § 1 exemption applies is for the Court, and not the arbitrator, to decide.

New Prime argues that the arbitrator must decide whether the § 1 exemption applies because otherwise the Court would address the merits of the underlying dispute. More specifically, New Prime maintains that "the issue of whether the Plaintiff was an independent contractor or an employee is plainly entangled in the merits of Plaintiff's underlying claims arising out of his alleged misclassification." Docket No. 51, at 6. On a second appeal in the Van Dusen case,[7] the Ninth Circuit rejected a similar argument, stressing that its prior opinion "expressly held that a district court must determine whether an agreement for arbitration is exempt from arbitration under § 1 of the [FAA] as a threshold matter." Id. The Ninth Circuit directed the district court to "determine whether the Contractor Agreements between each appellant and Swift are exempt under § 1 of the FAA" before considering Swift's motion to compel on remand. Id. Thus, this Court must keep on trucking

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[7] After the Ninth Circuit denied the writ of mandamus, the plaintiffs moved "for reconsideration of the grant of Swift Transportation Co. Inc.'s motion to compel arbitration." Van Dusen v. Swift Transp. Co., Inc., 544 Fed. App'x 724, 724. The district court denied the motion for reconsideration, but certified a request for an interlocutory appeal. Van Dusen v. Swift Transp. Co., No. 2:10-CV-00899 JWS, 2011 WL 3924831, at *3 (D. Ariz. Sept. 7, 2011).

in the present case to determine whether the two operating agreements Oliveira signed on behalf of Hallmark Trucking LLC are contracts of employment within the § 1 exemption.

ORDER

The defendant's motion to compel arbitration and stay proceedings, and/or dismiss the case for improper venue, or, in the alternative, to dismiss Count III for failure to state a claim (Docket No. 35) is **DENIED** without prejudice. The parties may conduct factual discovery on the threshold question of the plaintiff's status as an employee or independent contractor until January 8, 2016. Any motions for summary judgment shall be filed by January 22, 2016.

/s/ PATTI B. SARIS.
Patti B. Saris
Chief United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DOMINIC OLIVEIRA, on his behalf and on behalf of all others similarly situated *Plaintiff-Appellee,* v. NEW PRIME, INC., *Defendants-Appellants.*	No. 15-2364

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Patti B. Saris, U.S. District Judge]

Before

Thompson and Kayatta, Circuit Judges,
and Barbadoro,* District Judge.

Theodore J. Boutrous, Jr., with whom Joshua S. Lipshutz, Jason C. Schwartz, Thomas M. Johnson, Jr., Lindsay S. See, Gibson, Dunn & Crutcher LLP, William E. Quirk, James C. Sullivan, Robert J. Hingula, Polsinelli PC, Judith A. Leggett, and Leggett Law Firm, P.C. were on brief, for appellant.

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* Of the District of New Hampshire, sitting by designation.

Jennifer D. Bennett, with whom Public Justice, P.C., Hillary Schwab, Fair Work, P.C., Andrew Schmidt, and Andrew Schmidt Law, PLLC were on brief, for appellee.

Richard Frankel on brief for amicus curiae in support of appellee.

May 12, 2017

THOMPSON, Circuit Judge. This case raises two questions of first impression in this circuit. First, when a federal district court is confronted with a motion to compel arbitration under the Federal Arbitration Act (FAA or Act), 9 U.S.C. §§ 1-16, in a case where the parties have delegated questions of arbitrability to the arbitrator, must the court first determine whether the FAA applies or must it grant the motion and let the arbitrator determine the applicability of the Act? We hold that the applicability of the FAA is a threshold question for the court to determine before compelling arbitration under the Act. Second, we must decide whether a provision of the FAA that exempts contracts of employment of transportation workers from the Act's coverage, see id. § 1 (the § 1 exemption), applies to a transportation-worker agreement that establishes or purports to establish an independent-contractor relationship. We answer this question in the affirmative. Accordingly, we affirm the district court's order denying the motion to compel arbitration and dismiss this appeal for lack of appellate jurisdiction.

Background[1]

The defendant, New Prime, Inc. (Prime), operates an interstate trucking company. Under its Student Truck Driver Program (apprenticeship program), Prime recruits and trains new drivers. Prime touts its program as offering "[p]aid [a]pprenticeship [Commercial Driver's License (CDL)] [t]raining." After attending a four-day orientation, student drivers hit the road with a Prime truck driver, who acts as an on-the-job instructor. In this phase of the apprenticeship program, student drivers must log 10,000 miles as a driver or passenger, and, apart from an advance of $200 per week for food (which eventually must be repaid), the apprentices are not paid.[2] After

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[1] Because the motion to compel arbitration was made in connection with a motion to dismiss or stay, we glean the relevant facts from the operative complaint and the documents submitted to the district court in support of the motion. See Gove v. Career Sys. Dev. Corp., 689 F.3d 1, 2 (1st Cir. 2012).

[2] This arrangement allows Prime to transport its shipments in a more economical and efficient manner. Under United States Department of Transportation regulations, a truck driver's "[o]n-duty time" includes "[a]ll driving time" as well as a host of other non-driving tasks, including time spent supervising a student driver who is behind the wheel. 49 C.F.R. § 395.2.In any fourteen-hour period of on-duty time, a truck driver has only eleven hours of driving time. Id. § 395.3(a)(2)-(3)(i). After a Prime instructor driver has maxed out his or her eleven hours of driving time, the instructor driver still has three more hours of on-duty time remaining.Thus, once an instructor driver has exhausted his or her own driving time, a student driver can drive the truck toward its ultimate destination for up to three more hours, and Prime does not pay the student driver for this bonus driving time.

completing the supervised-driving period, the student driver takes the examination for a CDL and then must drive 30,000 more miles as a B2 company driver trainee (B2 trainee). Prime pays its B2 trainees fourteen cents per mile. At the conclusion of the B2 trainee portion of the apprenticeship program, the apprentices attend the district court in support of the motion. See Gove v. Career Sys. Dev. Corp., 689 F.3d 1, 2 (1st Cir. 2012). additional orientation classes for approximately one week. Apprentices are not paid for time spent in this orientation.

The plaintiff, Dominic Oliveira, is an alum of Prime's apprenticeship program. He was not paid for the time he spent in orientation and was paid on a per-mile basis while driving as a B2 trainee, although Prime docked his pay during this period to recoup the $200 advances that it paid him during the supervised-driving period.

Drivers are relieved of paying tuition for the apprenticeship program as long as they remain with Prime for one year as either company drivers or independent contractors. After completing the program, drivers choose between the two options, and Prime offers a $100 bonus to those who elect independent- contractor status When Oliveira finished the apprenticeship program, Prime representatives informed him that he would make more money as an independent contractor than a company driver. Prime directed Oliveira to Abacus Accounting (Abacus) — a company with offices on the second floor of Prime's building — to assist him in forming a limited liability company (LLC). After Oliveira filled out a form provided by Abacus and listed his preferred LLC names, Abacus created Hallmark Trucking LLC (Hallmark) on Oliveira's behalf.

Prime then directed Oliveira to the offices of Success Leasing (Success) — located on the first floor of the same building - 5 - — for help in securing a truck. After selecting a truck, Oliveira was informed that his first load of freight was ready to be trucked for Prime, and he was instructed to sign the highlighted portions of several documents before hitting the road. He hastily did so, and Prime then steered him towards its company store, where he purchased — on credit — $5,000 worth of truck equipment and fuel.

Among the documents Oliveira signed was an Independent Contractor Operating Agreement (the contract) between Prime and Hallmark.[3] The contract specified that the relationship between the parties was that "of carrier and independent contractor and not an employer/employee relationship" and that "[Oliveira is] and shall be deemed for all purposes to be an independent contractor, not an employee of Prime."[4] Additionally, under the contract, Oliveira retained the rights to provide transportation services to companies besides Prime,[5] refuse to haul any load

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[3] Around ten months later, Hallmark and Prime executed another Independent Contractor Operating Agreement. Because the pertinent language of the two agreements is identical, we refer to them collectively as "the contract." When quoting the contract in this opinion, we omit any unnecessary capitalization.

[4] Although the contract was between Prime and Hallmark, Prime has — with one small exception discussed below, see note 15, infra — treated the contract as one between Prime and Oliveira. We similarly treat Oliveira and Hallmark interchangeably.

[5] Before he could drive for another carrier, however, Oliveira was contractually obligated to give Prime five

[Footnote continued on next page]

offered by Prime, and determine his own driving times and delivery routes. The contract also obligated Oliveira to pay all operating and maintenance expenses, including taxes, incurred in connection with his use of the truck leased from Success. Finally, the contract contained an arbitration clause under which the parties agreed to arbitrate "any disputes arising under, arising out of or relating to [the contract], . . . including the arbitrability of disputes between the parties."[6]

Oliveira alleges that, during his Hallmark days, Prime exercised significant control over his work. According to Oliveira, Prime required him to transport Prime shipments, mandated that he complete Prime training courses and abide by its procedures, and controlled his schedule. Because of Prime's pervasive involvement in his trucking operation, Oliveira was unable to work for any other trucking or shipping companies.

Prime consistently shortchanged Oliveira during his time as an independent contractor. Eventually, Oliveira — frustrated and, he alleges, unlawfully underpaid — stopped driving for Prime. It was a short-lived separation, however; Prime rehired Oliveira a month later, this time as a company driv-

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[Footnote continued from previous page]

days' advance notice and to "remove all identification devices, licenses and base plates from the [truck] and return [them] to Prime."

[6] The arbitration provision also specified that "arbitration between the parties will be governed by the Commercial Arbitration Rules of the American Arbitration Association [(AAA)]."

er. Oliveira alleges that his job responsibilities as a company driver were "substantially identical" to those he had as an independent contractor. Job responsibilities were not the only constant; Oliveira's pay as a company driver was as paltry as ever.

Oliveira filed this class action against Prime, alleging that Prime violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219, as well as the Missouri minimum-wage statute, by failing to pay its truck drivers minimum wage. Oliveira also asserted a class claim for breach of contract or unjust enrichment and an individual claim for violation of Maine labor statutes. Prime moved to compel arbitration under the FAA and stay the proceedings or, alternatively, to dismiss the complaint for improper venue and the breach of contract/unjust enrichment count for failure to state a claim upon which relief may be granted.[7] In its motion, Prime asserted that "Oliveira . . . entered into an Independent Contractor Operating Agreement with . . . Prime . . . to work as an owner-operator truck driver." (Emphasis added.)

In response, Oliveira argued that, because he was not a party to the contract between Prime and Hallmark, he could not be personally bound by any of its provisions, including the arbitration clause. He further contended that the motion to compel arbitration should be denied because, among other reasons, the contract is exempted from the FAA under § 1. He also argued that the question of the applicability of

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[7] Because the district court never addressed the alternative arguments for dismissal and Prime has not pressed them on appeal, we focus only on the motion to compel arbitration.

the § 1 exemption was one for the court, and not an arbitrator, to decide.

Prime disputed Oliveira's argument that he could not be personally bound by the contract between Prime and Hallmark, stating that "Oliveira and Hallmark Trucking are factually one and the same." Prime also took issue with both of Oliveira's other arguments, contending that the § 1 exemption does not include independent-contractor agreements and, in any event, the question of whether the § 1 exemption applies is a question of arbitrability that the parties had delegated to the arbitrator.[8]

The district court proceeded straight to the FAA issues and concluded that the question of the applicability of the § 1 exemption was for the court, and not an arbitrator, to decide. And it determined that it could not yet answer that question because (1) the "contracts of employment" language of the § 1 exemption does not extend to independent contractors; and (2) discovery was needed on the issue of whether Oliveira was a Prime employee or an independent contractor before the court could decide whether the contract was a contract of employment under the § 1

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[8] The parties also squabbled over whether Oliveira's claims arising from periods of time in which the contract was not in effect — during Oliveira's pre-contract time in the apprenticeship program and his post-contract stint as a company driver — were arbitrable under the arbitration clause of the contract. The district court did not resolve the issue, electing instead to focus on the question of whether the § 1 exemption applied.

exemption.[9] The district court therefore denied Prime's motion to compel arbitration without prejudice and permitted the parties to conduct discovery on Oliveira's employment status. Prime timely appealed.[10]

Analysis

The FAA lies at the center of the two questions raised by this appeal. Thus, before tackling those questions, we first briefly outline the statutory framework.

To combat deep-rooted judicial hostility towards arbitration agreements, Congress enacted the FAA in 1925. See Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 111 (2001). Section 2 of the FAA enshrines the "liberal federal policy favoring arbitration agreements," Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983), by declaring that an arbitration agreement in "a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2.

And the FAA does not simply talk the talk. Instead, two separate provisions provide the bite to

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[9] The district court noted that the parties did not dispute that Oliveira, as a truck driver, was a transportation worker under the § 1 exemption.

[10] Although interlocutory orders are ordinarily not immediately appealable, the FAA permits immediate appeal from an order denying a motion to compel arbitration. See 9 U.S.C. § 16(a)(1)(B); Gove, 689 F.3d at 3-4 n.1. We review the denial of a motion to compel arbitration de novo. Gove, 689 F.3d at 4.

back up § 2's bark. See Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 70 (2010). First, under § 3, a party may obtain a stay of federal-court litigation pending arbitration. See 9 U.S.C. § 3. Second, § 4 authorizes district courts to grant motions to compel arbitration. See id. § 4.

The scope of the FAA, however, is not unbounded. Section 1 of the FAA provides that the Act shall not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Id. § 1. The Supreme Court has interpreted this section to "exempt[] from the FAA . . . contracts of employment of transportation workers." Circuit City, 532 U.S. at 119.

This case presents us with two questions pertaining to the § 1 exemption. We address each question in turn.

A. Who Decides Whether the § 1 Exemption Applies?

The question of whether the district court or the arbitrator decides the applicability of the § 1 exemption is one of first impression in this circuit. The parties champion dueling out-of-circuit precedent in support of their respective positions on this issue. Relying on the Eighth Circuit's decision in Green v. SuperShuttle International, Inc., 653 F.3d 766 (8th Cir. 2011), Prime argues that the question of whether the § 1 exemption applies is a question of arbitrability that must be decided by the arbitrator where, as here, the parties have delegated such questions to the arbitrator.

In Green, the plaintiffs, a class of shuttle-bus drivers, alleged that the defendant, a shuttle-bus

company, misclassified the drivers as franchisees instead of classifying them as employees. 653 F.3d at 767-68. When the defendant moved under the FAA to compel arbitration pursuant to the arbitration clause contained in the parties' contracts, the plaintiffs countered that their contract was outside the scope of the FAA by virtue of the § 1 exemption. Id. at 768. The Eighth Circuit upheld the district court's grant of the defendant's motion, concluding that "[a]pplication of the FAA's transportation worker exemption is a threshold question of arbitrability" in the parties' dispute. Id. at 769. Because the parties' agreements incorporated the AAA rules, which provide that the arbitrator has the power to determine his or her own jurisdiction, the court concluded that the parties agreed to allow the arbitrator to determine threshold questions of arbitrability, including the applicability of the § 1 exemption. Id.

With Green as its guide, Prime offers several reasons why the question of § 1's applicability is one for the arbitrator to determine, but each of these arguments flows from the Green court's characterization of this issue as a question of arbitrability. The case on which Oliveira relies — the Ninth Circuit's decision in In re Van Dusen, 654 F.3d 838 (9th Cir. 2011) — considered this characterization to be a flawed starting premise.

Van Dusen arose on facts strikingly similar to those in this case; the plaintiffs, interstate truck drivers, alleged that one of the defendants, a trucking company, misclassified its truck drivers as independent contractors to circumvent the requirements of the FLSA and parallel state laws. See id. at 840; see also Van Dusen v. Swift Transp. Co., 830 F.3d 893, 895 (9th Cir. 2016) (later appeal in same case).

The defendant moved to compel arbitration under the FAA, and the plaintiffs opposed that motion, asserting that the § 1 exemption applied to their contracts. Van Dusen, 654 F.3d at 840. The district court ordered arbitration, concluding that the question of whether the § 1 exemption applied was one for the arbitrator to decide in the first instance. Id. After the district court refused the plaintiffs' request for certification of an interlocutory appeal, the plaintiffs sought mandamus relief before the Ninth Circuit. Id.

The Ninth Circuit ultimately declined to issue the extraordinary remedy of mandamus relief because the district court's conclusion was not clearly erroneous in light of the dearth of federal appellate authority addressing the issue and the general federal policy in favor of arbitration. Id. at 845-46. The court nonetheless outlined why "the best reading of the law requires the district court to assess whether [the §] 1 exemption applies before ordering arbitration" under the FAA. Id. at 846. The court explained that, because a district court's authority to compel arbitration under the FAA exists only where the Act applies, "a district court has no authority to compel arbitration under Section 4 [of the FAA] where Section 1 exempts the underlying contract from the FAA's provisions." Id. at 843. The court elaborated:

> In essence, [the d]efendants and the [d]istrict [c]ourt have adopted the position that contracting parties may invoke the authority of the FAA to decide the question of whether the parties can invoke the authority of the FAA. This position puts the cart before the horse: Section 4 has simply no applicability where Section 1 exempts a contract from the FAA, and private contracting

> parties cannot, through the insertion of a delegation clause, confer authority upon a district court that Congress chose to withhold.

Id. at 844. The court also concluded that the question of whether the § 1 exemption applies "does not fit within th[e] definition" of "questions of arbitrability." Id.

After careful consideration of these competing cases, we are persuaded that the Ninth Circuit hit the nail on the head, and we therefore hold that the issue of whether the § 1 exemption applies presents a question of "whether the FAA confers authority on the district court to compel arbitration" and not a question of arbitrability. Id.

"The Supreme Court defines 'questions of arbitrability' as questions of 'whether the parties have submitted a particular dispute to arbitration.'" Id. (quoting Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002)); see also Rent-A-Ctr., 561 U.S. at 68-69 ("[P]arties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy."); *Arbitrability*, Black's Law Dictionary (10th ed. 2014) (defining arbitrability as "[t]he status, under applicable law, of a dispute's being or not being resolvable by arbitrators because of the subject matter"). In this case, determining whether the § 1 exemption applies to the contract does not entail any consideration of whether Prime and Oliveira have agreed to submit a dispute to arbitration; instead, it raises the "distinct inquiry" of whether the district court has the authority to act under the FAA — specifically, the authority under § 4 to compel the parties to engage in arbitration. Van Dusen, 654 F.3d at 844.

Therefore, as the Ninth Circuit explained in Van Dusen, the question of the court's authority to act under the FAA is an "antecedent determination" for the district court to make before it can compel arbitration under the Act. Id. at 843. Prime's argument to the contrary "puts the cart before the horse" and makes no sense. Id. at 844. The following scenario readily demonstrates why this is so: First, assume that two parties enter into a contract containing an arbitration clause with language identical to that contained in the contract in this case, including a provision delegating questions of arbitrability to the arbitrator. Second, assume that, unlike in this case, the parties are in agreement that the contract involved is clearly a contract of employment of a transportation worker. Third, assume that, as in this case, one of the parties, relying solely on the FAA, moves to compel arbitration. Taking Prime's position to its logical conclusion, the district court would be obligated to grant the motion because the parties have agreed to allow the arbitrator to decide questions of arbitrability, including whether the § 1 exemption applies. See Green, 653 F.3d at 769. This would be so even though the § 1 exemption indisputably applies to the contract, such that the district court had no authority to act under the FAA in the first place. See Van Dusen, 654 F.3d at 843 ("[A] district court has no authority to compel arbitration under Section 4 where Section 1 exempts the underlying contract from the FAA's provisions.").[11]

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[11] When confronted with the logical extreme of its position at oral argument, Prime sought to qualify it to some degree. Prime insisted that, so long as the party seeking to compel arbitration had a good-faith basis for asserting

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This position cannot be correct. When the only basis for seeking arbitration in federal court is the FAA, the district court can grant the requested relief only if it has authority to act under the FAA. See id. at 843. If the FAA does not apply, "private contracting parties cannot, through the insertion of a delegation clause, confer authority upon a district court [i.e., to compel arbitration under the FAA] that Congress chose to withhold." Id. at 844. Therefore, "the district court must make an antecedent determination that a contract is arbitrable under Section 1 of the FAA before ordering arbitration pursuant to Section 4." Id. at 843.

Because we reject Green's starting premise — that the issue of § 1's applicability is a question of arbitrability — we are unpersuaded by Green's reliance on a contract's incorporation of the AAA rules, which allow an arbitrator to determine his or her own jurisdiction. Where, as here, the parties dispute whether the district court has the authority to compel arbitration under the FAA, the extent of the arbitrator's jurisdiction is of no concern. Instead, we are concerned only with the question of whether the district court has authority to act under a federal stat-

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that the § 1 exemption did not apply, the question of the applicability of the § 1 exemption would need to be arbitrated under the delegation clause of the arbitration agreement. But, even with this minor qualification, Prime's position still boils down to the conclusion that the district court can compel arbitration under the FAA before determining whether it has authority to act under the FAA, even in a case where it might not have such authority. We do not accept this position.

ute. Nothing in the AAA rules — including the power to determine the arbitrator's jurisdiction — purports to allow the arbitrator to decide whether a federal district court has the authority to act under a federal statute.[12]

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[12] We are likewise unmoved by each of Prime's subsidiary arguments, all of which are grounded on the question-of arbitrability premise that we reject. For example, Prime's invocation of the liberal federal policy in favor of arbitration and its corollary, the principle that any doubts about the scope of arbitrable issues should be resolved in favor of arbitration, goes nowhere because we are not confronted with a scope question. See Paul Revere Variable Annuity Ins. Co. v. Kirschhofer, 226 F.3d 15, 25-26 (1st Cir. 2000). Similarly, Prime's argument that, so long as the court is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue," 9 U.S.C. § 4, the court must compel arbitration overlooks that one does not even approach the § 4 inquiry until one first determines that the § 1 exemption does not apply. See Van Dusen, 654 F.3d at 843-44. Finally, Prime's effort to compare the question of the applicability of the § 1 exemption to questions concerning the validity of an agreement or whether it can be enforced by the party seeking to compel arbitration — questions that can be referred to the arbitrator — is unavailing. Issues concerning alleged flaws with an agreement's validity or enforceability are fundamentally different than the issue of the district court's authority to act under the FAA in the first place. See id. at 844 ("[P]rivate contracting parties cannot, through the insertion of a delegation clause, confer authority upon a district court that Congress chose to withhold."). Additionally, it is not unusual for a court to first decide a specific challenge to the validity or enforceability of the arbitration clause that a party is seeking to enforce. See Rent-A-Ctr., 561 U.S. at 71; Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967).

For all these reasons, we join our colleagues on the Ninth Circuit and hold that the question of whether the § 1 exemption applies is an antecedent determination that must be made by the district court before arbitration can be compelled under the FAA. But we can't stop there.

B. Independent Contractors and the § 1 Exemption

After concluding that it must decide for itself whether the § 1 exemption applies, the district court in this case ordered the parties to conduct factual discovery to determine whether Oliveira was truly an independent contractor or instead was in reality a Prime employee during the time that the contract was in place. Discovery on that issue was necessary, in the court's view, because "courts generally agree that the § 1 exemption does not extend to independent contractors."

On appeal, both parties challenge this aspect of the district court's order. Prime agrees that § 1 does not extend to independent contractors, but it argues that discovery on the relationship between the parties is inappropriate because Oliveira's status as a Prime employee or independent contractor should be decided by the arbitrator. See AT&T Techs., Inc. v. Comm'cns Workers of Am., 475 U.S. 643, 649 (1986) ("[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims."). Alternatively, Prime argues that if the district court must determine whether the § 1 exemption applies, it should consider only whether the face of the contract demonstrates an intent to make Oliveira an independent contractor. Oliveira, on the other hand, argues that the § 1 exemption covers the

employment contracts of "all transportation workers, including independent contractors." If we agree with Oliveira, discovery is not needed.

Thus, the question presented is whether the § 1 exemption extends to transportation-worker agreements that establish or purport to establish independent-contractor relationships, and we review this issue of statutory interpretation de novo.[13] See Unit-

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[13] We have considered the possibility, proposed by our dissenting colleague, of remanding without deciding this question of statutory interpretation. The benefit of this approach, according to the dissent, would be avoiding this difficult legal question now on the chance that the discovery contemplated by the district court might lead to a conclusion that Oliveira is not an independent contractor — a conclusion that would moot, for this case, the question whether independent contractors are within the exemption. But we do not view this approach as a viable option because the district court ordered discovery based on its legal conclusion that "the § 1 exemption does not extend to independent contractors." If that legal conclusion is incorrect — an issue that Oliveira sufficiently raised below and both parties have briefed on appeal — there is no need for discovery in the first place. Therefore, we will not adopt an approach that assumes away one of the live issues on appeal simply because the issue is a difficult one. Cf. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 375 (2010) (Roberts, C.J., concurring) ("It should go without saying . . . that we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right. Thus while it is true that '[i]f it is not necessary to decide more, it is necessary not to decide more,' . . . sometimes it is necessary to decide more. There is a difference between judicial restraint and judicial abdication."). Finally, we note that we are not convinced that the dissent's approach in fact provides a narrower ground of decision; such an approach would require us to address Prime's contention (which the dissent implicitly rejects)

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ed States v. Maldonado-Burgos, 844 F.3d 339, 340 (1st Cir. 2016). As always, the statutory text is our starting point. See id. The § 1 exemption provides that nothing contained in the FAA "shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (emphasis added). The Supreme Court has declared that "[§] 1 exempts from the FAA only contracts of employment of transportation workers." Circuit City, 532 U.S. at 119.

Before embarking on our analysis, we first identify two issues that we need not decide. First, Prime does not dispute that Oliveira, whose work for Prime included driving a truck across state lines, is a "transportation worker" within the meaning of the § 1 exemption, as interpreted by Circuit City.[14] Thus,

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that discovery on the parties' relationship would render the contractual right to arbitration a nullity. Addressing that contention would present its own set of challenges, but, given the manner in which we decide the statutory-interpretation question, that issue is the one that need not be decided in this appeal.

14 The district court's decision indicated that the parties did not dispute this issue. Similarly, Prime did not argue in its opening brief that Oliveira is not a transportation worker. In a single sentence in its reply brief, Prime asserts that this court "has never extended the [§] 1 [e]xemption to truck drivers, as opposed to rail workers and seamen (the core workers of concern when Congress enacted the exemption)." To the extent that Prime intended this lone sentence to resurrect the transportation-worker issue in this case, we will not allow it. Any such "argument" is wholly undeveloped, see United States v. Sevilla-Oyola, 770 F.3d 1, 13 (1st Cir. 2014) ("Arguments

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we have no need to definitively decide that issue. Second, we note that, although the parties to the contract are Prime and Hallmark, Prime has, both below and on appeal, treated the contract as one between Oliveira and Prime.[15] We do the same. There-

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raised in only a perfunctory and undeveloped manner are deemed waived on appeal."), and, moreover, an argument that makes its debut in a reply brief will not receive a warm ovation from us, see United States v. Arroyo-Blas, 783 F.3d 361, 366 n.5 (1st Cir. 2015) ("[A] legal argument made for the first time in an appellant's reply brief comes too late and need not be addressed." (quoting United States v. Brennan, 994 F.2d 918, 922 n.7 (1st Cir. 1993))). Finally, we note in passing that Prime's position has not been accepted elsewhere. See, e.g., Lenz v. Yellow Transp., Inc., 431 F.3d 348, 351 (8th Cir. 2005) ("Indisputably, if Lenz were a truck driver, he would be considered a transportation worker under § 1 of the FAA."); Harden v. Roadway Package Sys., Inc., 249 F.3d 1137, 1140 (9th Cir. 2001) ("As a delivery driver for RPS, Harden contracted to deliver packages 'throughout the United States, with connecting international service.' Thus, he engaged in interstate commerce that is exempt from the FAA.").

[15] Before the district court, Prime opposed Oliveira's argument that he could not be personally bound by the terms of the contract between Prime and Hallmark by arguing that "Oliveira and Hallmark Trucking are factually one and the same." Along similar lines, Prime stated in its opening brief that "Oliveira entered into an Independent Contractor Operating Agreement . . . with Prime" (emphasis added), and its brief proceeded on the assumption that Oliveira and Hallmark were interchangeable. In its reply brief, for the first time in this case, Prime relies on the fact that the contract was between Prime and Hallmark in arguing that the contract established an independent-contractor relationship. We need not decide

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fore, because the parties do not dispute that Oliveira is a transportation worker under § 1, we need not address whether an LLC or other corporate entity can itself qualify as a transportation worker. We also need not address the scope of the word "worker" in the residual clause of the § 1 exemption. Accordingly, we limit our focus to the issue of whether an agreement between a trucking company and an individual transportation worker cannot be a "contract of employment" within the meaning of § 1 if the agreement establishes or purports to establish an independent-contractor relationship.

Prime points out that the weight of district-court authority to consider the issue has concluded that the § 1 exemption does not extend to contracts that establish or purport to establish an independent-contractor relationship.[16] Several of these decisions

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whether Prime is judicially estopped from taking this position at this late juncture; it suffices that a reply brief is not the appropriate place to switch gears and offer new arguments. See Arroyo-Blas, 783 F.3d at 366 n.5.

[16] See, e.g., Aviles v. Quik Pick Express, LLC, No. CV-15-5214-MWF (AGR), 2015 WL 5601824, at *6 (C.D. Cal. Sept. 23, 2015); Morning Star Assocs., Inc. v. Unishippers Glob. Logistics, LLC, No. CV-115-033, 2015 WL 2408477, at *5-7 (S.D. Ga. May 20, 2015); Doe v. Swift Transp. Co., No. 2:10-cv-00899 JWS, 2015 WL 274092, at *3 (D. Ariz. Jan. 22, 2015); Alvarado v. Pac. Motor Trucking Co., No. EDCV 14-0504-DOC(DTBx), 2014 WL 3888184, at *4-5 (C.D. Cal. Aug. 7, 2014); Villalpando v. Transguard Ins. Co. of Am., 17 F. Supp. 3d 969, 982 (N.D. Cal. 2014); Carney v. JNJ Express, Inc., 10 F. Supp. 3d 848, 852 (W.D. Tenn. 2014); Port Drivers Fed'n 18, Inc. v. All Saints, 757 F. Supp. 2d 463, 472 (D.N.J. 2011); Davis v. Larson Moving & Storage Co., Civ. No. 08-1408 (JNE/JJG), 2008 WL

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simply assume, explicitly or implicitly, that independent-contractor agreements are not contracts of employment under § 1. See, e.g., Aviles, 2015 WL 5601824, at *6; Doe, 2015 WL 274092, at *3; Villalpando, 17 F. Supp. 3d at 982; Bell, 2009 WL 4730564, at *4-6; Davis, 2008 WL 4755835, at *4; Kayser, 1999 WL 817724, at *4 n.4; see also Johnson, 608 N.E.2d at 540.[17] Other courts have "simply

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4755835, at *4 (D. Minn. Oct. 27, 2008); Owner-Operator Indep. Drivers Ass'n v. United Van Lines, LLC, No. 4:06CV219 JCH, 2006 WL 5003366, at *3 (E.D. Mo. Nov. 15, 2006); Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co., 288 F. Supp. 2d 1033, 1035-36 (D. Ariz. 2003); Roadway Package Sys., Inc. v. Kayser, No. CIV. A. 99-MC-111, 1999 WL 817724, at *4 n.4 (E.D. Pa. Oct. 13, 1999); see also Performance Team Freight Sys., Inc. v. Aleman, 194 Cal. Rptr. 3d 530, 536-37 (Cal. Ct. App. 2015); Johnson v. Noble, 608 N.E.2d 537, 540 (Ill. App. Ct. 1992); cf. Bell v. Atl. Trucking Co., No. 3:09-cv-406-J-32MCR, 2009 WL 4730564, at *4-6 (M.D. Fla. Dec. 7, 2009) (conducting analysis on applicability of § 1 exemption on assumption it does not apply to independent contractors).

[17] This assumption was implicit in Judge Ikuta's dissenting opinion in In re Swift Transportation Co., 830 F.3d 913 (9th Cir. 2016). The majority in Swift determined that mandamus relief was not warranted because the district court's proposed course of action — "resolv[ing] the § 1 question through discovery and a trial" — was not clearly erroneous; the district court's decision was not contrary to any Supreme Court or Ninth Circuit precedent, and "there [did] not appear to be any decisions from [the other] circuits on the question of whether the FAA compels a certain procedural choice in a district court's § 1 determination." Id. at 917. Judge Ikuta dissented, expressing her belief that the § 1 determination should be made solely from an examination of the contract's terms. Id. at 920-21

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go[ne] along with the developing group consensus," In re Atlas IT Exp. Corp., 761 F.3d 177, 183 (1st Cir. 2014), without adding any independent analysis. See, e.g., Alvarado, 2014 WL 3888184, at *4-5; Carney, 10 F. Supp. 3d at 853; All Saints, 757 F. Supp. 2d at 472; see also Aleman, 194 Cal. Rptr. 3d at 536-37. The few district-court decisions that offer independent analysis to support the conclusion that the § 1 exemption does not cover independent-contractor agreements have, viewed collectively, offered two reasons for that conclusion: first, that this interpretation is consistent with the "strong and liberal federal policy favoring arbitral dispute resolution," Swift Transp., 288 F. Supp. 2d at 1035-36; see also Morning Star, 2015 WL 2408477, at *5; United Van Lines, 2006 WL 5003366, at *3; and, second, that such a rule is justified by the narrow construction that the Supreme Court has instructed courts to give the § 1 exemption, see United Van Lines, 2006 WL 5003366, at *3.

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(Ikuta, J., dissenting). Implicit in Judge Ikuta's dissent is the assumption that independent-contractor agreements are not contracts of employment under the FAA. But there was good reason for that assumption in the circumstances of that case: Unlike in this case, none of the litigants argued that independent-contractor agreements of transportation workers are contracts of employment. And the district court in that case simply assumed — with no analysis or citation to authority — that the § 1 exemption covered only contracts between employers and employees. See Doe, 2015 WL 274092, at *3 ("Whether the parties formed an employment contract — that is whether plaintiffs were hired as employees — necessarily involves a factual inquiry apart from the contract itself.").

Prime urges us to add our voice to this "judicial chorus," but we are unwilling to do so. Interpreting a federal statute is not simply a numbers game. See In re Atlas IT Exp. Corp., 761 F.3d at 182-83 ("The numbers favoring a rule do not necessarily mean that the rule is the best one. Indeed, there is an observable phenomenon in our courts of appeal and elsewhere — sometimes called 'herding' or 'cascading' — where decisionmakers who first encounter a particular issue (i.e., the first court to consider a question) are more likely to rely on the record presented to them and their own reasoning, while later courts are increasingly more likely to simply go along with the developing group consensus."). Instead of simply tallying the score, "it is always incumbent on us to decide afresh any issue of first impression in our circuit." Id. at 183. After conducting that fresh look in this case, we are distinctly unpersuaded by the district courts' treatment of this issue.

The fatal flaw in the district-court authority on which Prime relies is a failure to closely examine the statutory text — the critical first step in any statutory-interpretation inquiry. See Maldonado-Burgos, 844 F.3d at 340. Because Congress did not provide a definition for the phrase "contracts of employment" in the FAA, we "give it its ordinary meaning." United States v. Stefanik, 674 F.3d 71, 77 (1st Cir. 2012) (quoting United States v. Santos, 553 U.S. 507, 511 (2008)). And we discern the ordinary meaning of the phrase at the time Congress enacted the FAA in 1925. See Perrin v. United States, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. Therefore, we look to the ordinary meaning of the term . . . at the time Congress enact-

ed the statute . . . ." (citation omitted)); see also Sandifer v. U.S. Steel Corp., 134 S. Ct. 870, 876 (2014) (consulting "[d]ictionaries from the era of [statutory provision's] enactment" to espy ordinary meaning of undefined term); Carcieri v. Salazar, 555 U.S. 379, 388 (2009) ("We begin with the ordinary meaning of the word 'now,' as understood when the [statute] was enacted.").[18] We now turn to that task.

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[18] At oral argument, Prime insisted that the Supreme Court in Circuit City rejected this approach for discerning the plain meaning of the FAA's text. But the Court did no such thing. In that case, the Court was confronted with an argument that, "because the FAA was enacted when congressional authority to regulate under the commerce power was to a large extent confined by [Supreme Court] decisions," the phrase "engaged in commerce" in § 1 should be interpreted as "expressing the outer limits of Congress'[s] power as then understood." Circuit City, 532 U.S. at 116. The Court rejected this argument, which it characterized as "[a] variable standard" depending on "shifts in the Court's Commerce Clause cases" that would require courts to "take into account the scope of the Commerce Clause, as then elaborated by the Court, at the date of the FAA's enactment in order to interpret what the statute means now." Id. at 116-17. The Court reasoned that "[i]t would be unwieldy for Congress, for the Court, and for litigants to be required to deconstruct statutory Commerce Clause phrases depending upon the year of a particular statutory enactment." Id. at 118. In this case, by contrast, our attempt to discern the ordinary meaning of the phrase "contracts of employment" does not require us to sort through paradigm shifts in Supreme Court precedent but simply to apply the "fundamental canon of statutory construction" that undefined statutory terms should be given their ordinary meaning at the time of the statute's enactment, Sandifer, 134 S. Ct. at 876 (quoting Perrin, 444 U.S. at 42) — a canon that has been applied in FAA cases since Circuit City. See, e.g., Conrad

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1. Ordinary Meaning of Statutory Text

Oliveira argues that the phrase "contracts of employment" contained in § 1 means simply "agreements to do work." We agree. This interpretation is consistent with the ordinary meaning of the phrase at the time Congress enacted the FAA.

Dictionaries from the era of the FAA's enactment confirm that the ordinary meaning of "contracts of employment" in 1925 was agreements to perform work. See Webster's New International Dictionary of the English Language 488 (W.T. Harris & F. Sturges Allen eds., 1923) (defining "contract" when used as noun as "[a]n agreement between two or more persons to do or forbear something"); id. at 718 (defining "employment" as "[a]ct of employing, or state of being employed" and listing "work" as synonym for "employment"); id. (defining "employ" as "[t]o make use of the services of; to have or keep at work; to give employment to"); see also Webster's Collegiate Dictionary 329 (3d ed. 1925) (providing similar definition of "employment" and similarly listing "work" as synonym for "employment"); id. (defining "employ" as "[t]o make use of; use" and "[t]o give employment or work to" and explaining "[e]mploy is specifically used to emphasize the idea of service to be rendered"). In other words, these contemporary dictionaries do not

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v. Phone Directories Co., 585 F.3d 1376, 1381-82 & n.1 (10th Cir. 2009) (in interpreting undefined term in § 16 of FAA, consulting dictionary from era of § 16's enactment).

suggest that "contracts of employment" distinguishes employees from independent contractors.[19]

Additionally, this ordinary meaning of "contracts of employment" is further supported by other authorities from the era of the FAA's enactment, which suggest that the phrase can encompass agreements of independent contractors to perform work. See, e.g., Annotation, Teamster as Independent Contractor Under Workmen's Compensation Acts, 42 A.L.R.

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[19] Although not referenced by either party, we note that the current edition of Black's Law Dictionary indicates that the earliest known use of the phrase "employment contract" was 1927 — two years after the FAA's enactment. See *Employment Contract*, Black's Law Dictionary (10th ed. 2014); id. at xxxi (explaining that "[t]he parenthetical dates preceding many of the definitions show the earliest known use of the word or phrase in English"). The current edition also indicates that "contract of employment" is a synonym for "employment contract," and it defines "employment contract" in a manner that arguably excludes independent contractors: "[a] contract between an employer and employee in which the terms and conditions of employment are stated." *Employment Contract*, Black's Law Dictionary (10th ed. 2014). It is unclear whether the unknown source from 1927 provided the basis for the current definition of "employment contract" or, instead, whether that source has merely been identified as the first known use of the phrase. We need not, however, dwell on this point because, as explained below, several sources from the era of the FAA's enactment use the phrase "contract of employment" to refer to independent contractors. Additionally, we note that the two editions of Black's Law Dictionary that bookend the FAA's enactment, see Black's Law Dictionary (3d ed. 1933); Black's Law Dictionary (2d ed. 1910), provide no definition for the phrases "contract of employment" or "employment contract."

607, 617 (1926) ("When the contract of employment is such that the teamster is bound to discharge the work himself, the employment is usually one of service, whereas, if, under the contract, the teamster is not obligated to discharge the work personally, but may employ others to that end and respond to the employer only for the faithful performance of the contract, the employment is generally an independent one." (emphasis added)); Theophilus J. Moll, A Treatise on the Law of Independent Contractors & Employers' Liability 47-48 (1910) ("It has been laid down that the relation of master and servant will not be inferred in a case where it appears that the power of discharge was not an incident of the contract of employment." (emphasis added)); id. at 334 ("The [independent] contractor . . . is especially liable for his own acts when he assumes this liability in his contract of employment." (emphasis added)).[20]

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[20] See also Luckie v. Diamond Coal Co., 183 P. 178, 182 (Cal. Dist. Ct. App. 1919) ("We think that the nature of Foulk's relation to defendant at the time of the accident, whether that of an independent contractor or servant, must be determined not alone from the terms of the written contract of employment, but from the subsequent conduct of each, known to and acquiesced in by the other." (emphasis added)); Hamill v. Territilli, 195 Ill. App. 174, 175 (1915) ("[T]he only question in the case was whether or not, under the contract of employment, the relationship existing between Territilli and Scully and the appellant was that of independent contractor or that of master and servant . . . ." (emphasis added)); Eckert's Case, 124 N.E. 421, 421 (Mass. 1919) ("It was provided by his contract of employment that he should furnish the team, feed, take care of and drive the horses for a fixed daily remuneration. The entire management and mode of transportation were under his control . . . . It is plain as matter of law . . .

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that when injured he was not an employé of the town but an independent contractor." (emphasis added) (citations omitted)); Lindsay v. McCaslin, 122 A. 412, 413 (Me. 1923) ("When the contract of employment has been reduced to writing, the question whether the person employed was an independent contractor or merely a servant is determined by the court as a matter of law." (emphasis added)); Allen v. Bear Creek Coal Co., 115 P. 673, 679 (Mont. 1911) ("The relation of the parties under a contract of employment is determined by an answer to the question, Does the employé in doing the work submit himself to the direction of the employer, both as to the details of it and the means by which it is accomplished? If he does, he is a servant, and not an independent contractor. If, on the other hand, the employé has contracted to do a piece of work, furnishing his own means and executing it according to his own ideas, in pursuance of a plan previously given him by the employer, without being subject to the orders of the latter as to detail, he is an independent contractor." (emphasis added)); Tankersley v. Webster, 243 P. 745, 747 (Okla. 1925) ("[T]he contract of employment between Tankersley and Casey was admitted in evidence without objections, and we think conclusively shows that Casey was an independent contractor." (emphasis added)); Kelley v. Del., L. & W. R. Co., 113 A. 419, 419 (Pa. 1921) ("The question for determination is whether deceased was an employee of defendant or an independent contractor . . . . To decide, it is necessary to construe the written contract of employment . . . ." (emphasis added)); U.S. Fid. & Guar. Co. of Baltimore, Md. v. Lowry, 231 S.W. 818, 822 (Tex. Civ. App. 1921) (stating that, in determining whether person "was an employé and not an independent contractor," "'[n]o single fact is more conclusive as to the effect of the contract of employment, perhaps, than the unrestricted right of the employer to end the particular service whenever he chooses, without regard to the final result of the work itself'" (emphasis added) (quoting Cockran v. Rice, 128 N.W. 583, 585 (S.D.

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Prime seeks to downplay the significance of these other authorities, noting that they do not deal with the FAA. True enough, but the phrase "contracts of employment" must have some meaning, and Prime does not attempt to explain how its proposed interpretation is consistent with the ordinary meaning of the words used in the statute. And the lack of a textual anchor is not the only flaw in Prime's interpretation. In Circuit City, the Supreme Court noted "Congress'[s] demonstrated concern with transportation workers and their necessary role in the free flow of goods" at the time when it enacted the FAA. 532 U.S. at 121. Given that concern, the distinction that Prime advocates based on the precise employment status of the transportation worker would have been a strange one for Congress to draw: Both individuals who are independent contractors performing trans-

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1910))); Annotation, General Discussion of the Nature of the Relationship of Employer and Independent Contractor, 19 A.L.R. 226, 250 (1922) (discussing "the question whether a contract of employment is one of an independent quality").

Along similar lines, legal dictionaries from the era of the FAA's enactment used the term "employment" as part of the definition of "independent contractor." See, e.g., *Independent Contractor*, Ballentine's Law Dictionary (1930) (defining independent contractor as "[o]ne who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work"); *Independent Contractor*, Black's Law Dictionary (3d ed. 1933) (same); *Independent Contractor*, Black's Law Dictionary (2d ed. 1910) (same); 2 Francis Rawle, Bouvier's Law Dictionary & Concise Encyclopedia 1533 (3d rev. 1914) (same).

portation work and employees performing that same work play the same necessary role in the free flow of goods.

In sum, the combination of the ordinary meaning of the phrase "contracts of employment" and Prime's concession that Oliveira is a transportation worker compels the conclusion that the contract in this case is excluded from the FAA's reach. Because the contract is an agreement to perform work of a transportation worker, it is exempt from the FAA. We therefore decline to follow the lead of those courts that have simply assumed that contracts that establish or purport to establish independent-contractor relationships are not "contracts of employment" within the meaning of § 1.

2. Narrow Construction and Policy Favoring Arbitration

We also are unpersuaded by the two justifications that some district-court decisions put forward to support the conclusion that the § 1 exemption does not apply to contracts that establish or purport to establish independent-contractor relationships — that such an interpretation is consistent with the need to narrowly construe § 1 and the liberal federal policy favoring arbitration. In our view, neither consideration warrants retreat from the ordinary meaning of the statutory text.

To be sure, the Supreme Court has cautioned that the § 1 exemption must "be afforded a narrow construction." Circuit City, 532 U.S. at 118. Prime seizes on this pronouncement and insists that it forecloses our conclusion that the § 1 exemption applies to transportation-worker agreements that establish or purport to establish independent-contractor relationships. We disagree.

In Circuit City, the contract at issue was between Circuit City, a national retailer of consumer electronics, and Adams, a store sales counselor. 532 U.S. at 109-10. The Ninth Circuit had interpreted the § 1 exemption to exclude all contracts of employment from the FAA's reach. Id. at 112. In defense of this interpretation, Adams argued that the phrase "engaged in . . . commerce" in § 1 exempted from the FAA all employment contracts falling within Congress's commerce power. Id. at 114. The Supreme Court rejected this broad interpretation in favor of a narrower one that was compelled by the text and structure of § 1: "Section 1 exempts from the FAA only contracts of employment of transportation workers." Id. at 119; see id. at 114-15. Because the phrase "any other class of workers engaged in . . . commerce" appeared in the residual clause of § 1, id. at 114, the Court reasoned that "the residual clause should be read to give effect to the terms 'seamen' and 'railroad employees,' and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it," id. at 115.

This context is critical. The Court announced the need for a narrow construction of the § 1 exemption in the course of "rejecting the contention that the meaning of the phrase 'engaged in commerce' in § 1 of the FAA should be given a broader construction than justified by its evident language." Id. at 118 (emphasis added). As the Court explained, this broader construction was doomed by the text itself; "the text of the FAA foreclose[d] the [broader] construction of § 1," id. at 119, and "undermine[d] any attempt to give the provision a sweeping, open- ended construction," id. at 118. The Court's narrower interpretation, by contrast, was based on "the precise reading" of that provision. Id. at 119.

It is one thing to say that statutory text compels adoption of a narrow construction over "an expansive construction . . . that goes beyond the meaning of the words Congress used." Id. Prime's argument is very different: It snatches up Circuit City's narrow-construction pronouncement, wholly ignores the context in which that pronouncement was made, and attempts to use it as an escape hatch to avoid the plain meaning of the § 1 exemption's text. But nothing in Circuit City suggests that the need for a narrow construction can override the plain meaning of the statutory language in this fashion, and we reject Prime's attempt to artificially restrict the plain meaning of the text.

Moreover, Oliveira is nothing like the sales counselor in Circuit City. Instead, the truck-driving work that he performs directly impacts "the free flow of goods." Id. at 121. Therefore, Circuit City's adoption of a narrow construction to cover only transportation workers and not sales counselors is no basis for this court to accept a constricted interpretation of the phrase "contracts of employment" that is inconsistent with both the ordinary meaning of the language used in § 1 and "Congress's demonstrated concern with transportation workers and their necessary role in the free flow of goods." Id. For these reasons, we do not view Circuit City or the narrow-construction principle as supporting Prime's interpretation that the § 1 exemption does not extend to independent contractors.

We are similarly unpersuaded by invocation of the federal policy in favor of arbitration. That policy cannot override the plain text of a statute. See EEOC v. Waffle House, Inc., 534 U.S. 279, 295 (2002) (rejecting notion that "the federal policy favoring arbi-

tration trumps the plain language of Title VII and the contract"); cf. id. at 294 (explaining that, "[w]hile ambiguities in the language of the agreement should be resolved in favor of arbitration, we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated" and concluding that "the proarbitration policy goals of the FAA do not require the [EEOC] to relinquish its statutory authority if it has not agreed to do so" (citation omitted)); Paul Revere, 226 F.3d at 25 (rejecting "attempts to invoke the federal policy favoring arbitration" because "[t]hat policy simply cannot be used to paper over a deficiency in Article III standing"); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 116 n.13 (1996) (Souter, J., dissenting) ("[P]lain text is the Man of Steel in a confrontation with background principle[s] and postulates which limit and control." (internal citation and quotation marks omitted)). As we have explained, a careful examination of the ordinary meaning of the phrase "contracts of employment" — an effort eschewed by the district-court authority cited by Prime — supports our conclusion that the phrase means agreements to perform work and includes independent-contractor agreements. The federal policy favoring arbitration cannot erase this plain meaning.

3. Final Words

For these reasons, we hold that a transportation-worker agreement that establishes or purports to establish an independent-contractor relationship is a contract of employment under § 1. We emphasize that our holding is limited: It applies only when arbitration is sought under the FAA, and it has no im-

pact on other avenues (such as state law) by which a party may compel arbitration.[21]

Conclusion

To recap, we hold that, when confronted with a motion to compel arbitration under § 4 of the FAA, the district court, and not the arbitrator, must decide whether the § 1 exemption applies. Additionally, we hold that transportation-worker agreements that establish or purport to establish independent-

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[21] Prime insists that, even if the district court is powerless to compel arbitration under the FAA because the § 1 exemption applies, it still can request the district court to "compel arbitration on other grounds, such as state law, or use other tools at its disposal to enforce the parties' explicit agreement to arbitrate — such as dismissing or staying the case." For his part, Oliveira appears to suggest that this ship has sailed because Prime's motion to compel was based solely on the FAA. Prime counters that, to the extent Oliveira is under the impression that Prime has waived the right to compel arbitration on grounds other than the FAA, he is mistaken because no prejudice has been shown. We do not wade into this dispute. The fleeting references in both parties' briefs are hardly the stuff of developed argumentation, and this waiver issue was not addressed by the district court. If the parties desire to continue this fight in the district court, they are free to do so.

Along similar lines, although Prime argues in its opening brief that the arbitration provision covers disputes between the parties that arose before and after the time period in which the contract was in effect, it takes a different tack in its reply brief, imploring us to refrain from deciding this issue because the district court did not definitively rule on it below. We accept Prime's invitation and leave the issue for the district court to address in the first instance.

contractor relationships are "contracts of employment" within the meaning of the § 1 exemption.[22] Because the contract in this case is within the § 1 exemption, the FAA does not apply, and we consequently lack jurisdiction under 9 U.S.C. § 16(a)(1)(B) — the only conceivable basis for our jurisdiction over this interlocutory appeal. See Int'l Bhd. of Teamsters Local Union No. 50 v. Kienstra Precast, LLC, 702 F.3d 954, 957-58 (7th Cir. 2012). Accordingly, we affirm the district court's denial of Prime's motion to compel arbitration, and dismiss the appeal for lack of appellate jurisdiction.

-Concurring and Dissenting Opinion Follows-

BARBADORO, District Judge, concurring in part and dissenting in part. I agree with the majority that the applicability of the § 1 exemption is a threshold matter for the district court to decide. Where we part company is at the point where the majority decides to take on the difficult issue as to whether transportation-worker agreements that purport to create independent-contractor relationships are exempt from the Federal Arbitration Act. That, in my view, is an issue we need not decide now. Instead, if it ultimately proves necessary to determine whether the § 1 exemption covers all such independent-contractor agreements, the district court should do so in the first instance with the benefit of more in-depth briefing and a fully developed factual record.

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[22] In light of this conclusion, we need not address the parties' arguments about the necessity and permissibility of discovery in the event that the § 1 exemption does not apply to independent-contractor agreements.

The scope of the § 1 exemption comes before us on what amounts to an interlocutory appeal. See Omni Tech Corp. v. MPC Sols. Sales, LLC, 432 F.3d 797, 800 (7th Cir. 2005). The district court did not reach any final judgment as to the exemption, instead dismissing New Prime's motion to compel arbitration without prejudice and allowing for discovery on Oliveira's employment status. Oliveira v. New Prime, Inc., 141 F. Supp. 3d 125, 135 (D. Mass. 2015). As there has been no final judgment in the district court, I hesitate to resolve an issue that is not necessary to the disposition of this appeal. See Doe v. Cape Elizabeth Sch. Dist., 832 F.3d 69, 86 (1st Cir. 2016) (declining to address unnecessary issue and deeming it prudent to allow district court to make determination in the first instance). And it is indeed unnecessary to determine the scope of the exemption at this time. If the case were remanded to the district court for discovery, the court might well rule that the nominally independent-contractor agreements between Oliveira and New Prime actually created an employer-employee relationship. In that circumstance, neither we nor the district court would have any occasion to categorically decide whether all transportation-worker agreements purporting to create independent-contractor relationships qualify for the § 1 exemption.

I am particularly reluctant to unnecessarily resolve an issue on an interlocutory appeal when, as is the case here, a number of factors counsel against doing so. Most fundamentally, deciding whether "contracts of employment" includes all transportation-worker agreements presents a challenging question of statutory interpretation. The statute itself provides little guidance. Further, as the majority notes, most courts that have considered independent-

contractor agreements in the § 1 context have concluded that the exemption does not apply, and no other court has engaged in the kind of detailed analysis of ordinary meaning that characterizes the majority's opinion. We therefore have neither an example to guide and corroborate our analysis nor a contrary opinion to provide counterbalance.

Moreover, applying § 1 in this case requires venturing into the fact-bound, and notoriously precarious, field of employment-status determinations. Although the majority's categorical rule would eliminate the need for fact-finding on status, it could also lead to the over- and under-inclusiveness concerns typical of such rules. As Justice Rutledge observed in NLRB v. Hearst Publications, 322 U.S. 111 (1944): "Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing." Id. at 121 (subsequent history omitted). The doctrinal line separating employee from independent contractor is difficult to discern in the context of vicarious liability. See id. "It becomes more [difficult] when the field is expanded to include all of the possible applications of the distinction." Id. We find ourselves confronted by one of those "possible applications," making the issue before us all the more challenging. See Mandel v. Boston Phoenix, Inc., 456 F.3d 198, 206–07 (1st Cir. 2006) (vacating and remanding summary judgment order where, inter alia, there was little on-point federal or state case law and pertinent determination was fact-intensive).

Not only do we face a hard question — given that the contemporary meaning of § 1's language may dif-

fer from its meaning when adopted — but we do so without the aid of a well-developed district court record. Before the district court, the parties provided little briefing on the ordinary meaning of "contracts of employment" as of 1925. Oliveira initially argued that he was an employee of New Prime. He first briefed an ordinary-meaning argument in a short supplemental surreply submitted to the district court after a hearing on the motion to compel arbitration. Oliveira cited just two sources from the time of adoption. In a subsequent supplemental surreply, New Prime declined to address the ordinary-meaning issue head-on, instead only reiterating that the matter was for the arbitrator. The district court's order reflects this dearth of briefing. Rather than directly addressing the less-than-robust argument Oliveira raised in his supplemental brief, the court noted the extensive contrary case law and permitted discovery to resolve the case. See Oliveira, 141 F. Supp. 3d at 130–31, 135. When the ordinary-meaning issue reached this court, the record accordingly provided little guidance. See United States v. Clark, 445 U.S. 23, 38 (1980) (Rehnquist, J., dissenting) (recognizing usefulness of lower court opinions); Cape Elizabeth Sch. Dist., 832 F.3d at 84–85 (choosing not to decide unnecessary question where parties gave "scant attention" to issue in lower court).

The briefing before this court was also less than ideal. Although Oliveira devoted significant effort to arguing that the ordinary meaning of "contracts of employment" in 1925 included contracts with independent contractors, New Prime barely addressed the matter. It did not mention the ordinary-meaning argument in its opening brief, and spent only a page on the topic in its reply brief. At oral argument, New Prime merely insisted that ordinary-meaning analy-

sis is inappropriate in the § 1 context. Where a court has the discretion to decide an issue, it should be wary of acting without the benefit of fully developed arguments on both sides. That is especially the case when we rule against the party with the less-developed argument.

Just as we have been presented with a one-sided view of the ordinary meaning of "contracts of employment," we have received a one-sided view of the facts. This appeal was taken early in the litigation between the parties, prior to any discovery that would have shed greater light on the facts underlying the dispute. The current factual record contains only Oliveira's unanswered complaint and some documents attached to the parties' motions. While the court is entitled to base its analysis on allegations in the complaint, Gove v. Career Sys. Dev. Corp., 689 F.3d 1, 2 (1st Cir. 2012), we should exercise added caution in denying affirmative relief to a defendant when our view of the facts is informed largely by the plaintiff's untested allegations.

Under these circumstances, our best option is to remand the § 1 exemption question to the district court so that discovery may proceed and the court may reach a final decision. If either party were to appeal any subsequent final decision of the district court, we would have the benefit of a better-developed factual record, more-focused briefing from both parties, and additional district court analysis. See Denmark v. Liberty Life Assur. Co. of Boston, 566 F.3d 1, 12 (1st Cir. 2009) (Lipez, J., concurring) (expressing concern over dicta in majority opinion "fashioned without the benefit of district court analysis or briefing by the parties").

The majority has done an impressive job of marshalling the arguments in support of its interpretation of § 1. I dissent not to take issue with the court's reasoning but merely to express my view that we would be better served in following a more cautious path.

UNITED STATES COURT OF APPEALS
For the First Circuit

DOMINIC OLIVEIRA, on his behalf and on behalf of all others similarly situated *Plaintiff-Appellee,* v. NEW PRIME, INC. *Defendant-Appellant.*	No. 15-2364

Before

Howard, Chief Judge,
Torruella, Lynch, Thompson,
Kayatta and Barron, Circuit Judges,
and Barbadoro,* District Judge.

ORDER OF COURT

Entered: June 27, 2017

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted

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* Of the District of New Hampshire, sitting by designation.

to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Richard H. Frankel
Hillary A. Schwab
Brant Casavant
Andrew Arthur Schmidt
Jennifer Bennett
William E. Quirk
Robert John Hingula
Judith A. Leggett
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Richard Pianka
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Warren David Postman
Archis Ashok Parasharami
Daniel Edward Jones
Kate Comerford Todd

No. 17-340

IN THE

Supreme Court of the United States

NEW PRIME, INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

Section 1 of the Federal Arbitration Act ("FAA") provides that the FAA does not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Respondent is an independent contractor whose agreement with interstate trucking company New Prime, Inc. ("New Prime") includes a mandatory arbitration provision requiring respondent to arbitrate all workplace disputes with New Prime on an individual basis. Respondent does not challenge the validity of the arbitration agreement he signed nor the delegation clause contained therein, which mandates that all disputes regarding arbitrability be decided by an arbitrator. Nonetheless, respondent filed a putative class action in court and opposed arbitration on the basis of the Section 1 exemption.

The questions presented are:

1. Whether a dispute over applicability of the FAA's Section 1 exemption is an arbitrability issue that must be resolved in arbitration pursuant to a valid delegation clause.

2. Whether the FAA's Section 1 exemption, which applies on its face only to "contracts of employment," is inapplicable to independent contractor agreements.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that petitioner New Prime, Inc. has no parent corporation and no publicly held corporation owns ten percent (10%) or more of its stock. New Prime, Inc. is a privately owned company.

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BRIEF FOR PETITIONER

Petitioner New Prime, Inc. respectfully requests that the Court reverse the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 857 F.3d 7 (1st Cir. 2017). J.A. 152. The order of the Court of Appeals denying rehearing and rehearing en banc is unpublished. J.A. 193. The order of the district court is reported at 141 F. Supp. 3d 125 (D. Mass. 2015). J.A. 134.

JURISDICTION

The First Circuit entered judgment on May 12, 2017, and denied New Prime's timely petition for rehearing and rehearing en banc on June 27, 2017. New Prime filed a petition for a writ of certiorari on September 6, 2017, and this Court granted it on February 26, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 1 of the Federal Arbitration Act, 9 U.S.C. § 1, provides:

> "Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy,

> would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or with foreign nations, or in the Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

The decision below reflects the latest effort by a lower court to avoid the dictates of the Federal Arbitration Act ("FAA") and invalidate an arbitration

agreement containing a class waiver. This time, the feat was accomplished through a nonsensical interpretation of the FAA itself.

Section 1 of the FAA exempts a narrow class of transportation workers from the purview of the statute—those who have signed "contracts of employment." 9 U.S.C. § 1. This Court has instructed that the Section 1 exemption must be given a "precise reading" and "a narrow construction," in order to ensure the FAA accomplishes its purpose of "overcom[ing] judicial hostility to arbitration agreements." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118–19 (2001) (citation omitted).

The First Circuit did the opposite. It read the Section 1 exemption expansively and effectively eliminated arbitration as a viable means of dispute resolution for the entire transportation industry. According to the court of appeals, the term "contracts of employment" in Section 1 should be read to include contracts of *non*-employment—that is, independent contractor agreements—notwithstanding the plain language of Section 1 to the contrary. J.A. 182.

This Court should reverse the First Circuit and compel arbitration, in accordance with the plain language of the parties' agreements and the FAA.

1. Petitioner New Prime, Inc. ("New Prime") is an interstate trucking company that engages both company drivers and independent contractors to operate vehicles. Respondent Dominic Oliveira is a former New Prime truck driver who chose to become an independent contractor.

Prior to becoming an independent contractor, respondent took part in New Prime's Student Truck Driver Program, which allowed him to work under the

supervision of a licensed truck driver as he gained the 30,000-plus miles of driving experience necessary to obtain a commercial driver's license under federal regulations. After completing the program, respondent had the option of becoming a New Prime employee, but chose instead to establish an independent business, Hallmark Trucking LLC, that contracted to perform services for New Prime. On behalf of Hallmark Trucking LLC, respondent entered into two separate "Independent Contractor Operating Agreements" with New Prime, the purpose of which was "to establish an independent contractor relationship at all times." J.A. 65; *see also id.* at 86. Both Agreements provided that "[a]ny disputes arising under, arising out of or relating to [the] agreement, including . . . the arbitrability of disputes between the parties, shall be fully resolved by arbitration[.]" J.A. 82; *id.* at 102–03.

As an independent contractor working with New Prime, respondent enjoyed substantial freedoms and opportunities he would not otherwise have had as a New Prime employee. He was able to "determine the means and methods of performance of all transportation services undertaken under the terms of th[e] Agreement, including driving times and deliver[y] routes," to "refuse to haul any load offered . . . by [New] Prime," and "to provide services for another carrier during the term of th[e] Agreement." J.A. 65; *id.* at 86. Respondent was also permitted to hire other drivers to provide shipping services under the Agreements. J.A. 70–71; *id.* at 91–92. Each of these features of respondent's independent-contractor relationship with New Prime allowed him the flexibility to make independent business decisions that would have been unavailable to him as an employee.

2. Notwithstanding the plain directive of the Independent Contractor Operating Agreements to arbitrate all disputes arising under them, respondent filed a putative class action in federal district court, asserting claims for unpaid wages, misclassification, and breach of contract. When New Prime moved to compel arbitration, respondent opposed. He did not dispute that he freely executed the Independent Contractor Operating Agreements, nor did he dispute that his claims fell within the scope of the arbitration provisions. Instead, respondent insisted that the Operating Agreements were "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, such that New Prime could not enforce the arbitration provisions under the FAA.

3. The district court denied New Prime's motion to compel arbitration. The court concluded that although the delegation clause was valid, the applicability of the Section 1 exemption could not be adjudicated by an arbitrator. The district court acknowledged that Section 1's reference to "contracts of employment" refers to employer-employee arrangements only, not independent contractor agreements, explaining that "[t]his construction comports well" with the FAA's purpose and this Court's decision in *Circuit City*. J.A. 141. But because the contract terms and factual record did not, in the district court's view, make clear whether New Prime and respondent were engaged in an employer-employee or independent-contractor relationship under state law, the district court ordered discovery and announced its intention to hold a mini-trial on that question before it would determine whether the Section 1 exemption applies.

4. New Prime immediately appealed the district court's order denying its motion to compel arbitration. 9 U.S.C. § 16. The First Circuit affirmed. The court agreed with the district court that despite the existence of an indisputably valid delegation clause, the applicability of the Section 1 exemption was not for an arbitrator to decide. J.A. 168; *id.* at 186. The First Circuit acknowledged that this conclusion conflicted with a prior decision of the Eighth Circuit, which found that applicability of the Section 1 exemption is an arbitrable issue. *See Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011). *Contra In re Van Dusen*, 654 F.3d 838, 843 (9th Cir. 2011) (holding that a court is required to assess whether the Section 1 exemption applies before ordering arbitration).

Two members of the panel went further, however, holding—contrary to the district court's decision below—that there was no need for discovery or a mini-trial to determine respondent's employment status because the phrase "contracts of employment" in Section 1 of the FAA simply means "an agreement to perform work of a transportation worker." J.A. 182. Thus, according to the First Circuit, the parties' Independent Contractor Operating Agreements were exempt from the FAA *irrespective* of whether respondent was an employee or independent contractor. In so ruling, the panel majority acknowledged that "the weight of district-court authority to consider the issue ha[d] concluded that the § 1 exemption does not extend to contracts that establish or purport to establish an independent-contractor relationship." J.A. 172. And in a footnote, the panel majority conceded that the Ninth Circuit—the only other circuit court to address the issue—had embraced the opposite interpretation. J.A. 173–74 (quoting *In re Swift Transp. Co., Inc.*, 830 F.3d

913 (9th Cir. 2016) ("*Van Dusen III*")); *see also Performance Team Freight Sys., Inc. v. Aleman*, 241 Cal. App. 4th 1233 (2015).

Judge Barbadoro, sitting by designation, dissented from the second part of the panel's decision. J.A. 187.

SUMMARY OF ARGUMENT

I. Where, as here, a contract contains a valid delegation clause, the question whether the contract is a "contract of employment" within the meaning of Section 1 of the FAA is an arbitrability issue that must be submitted to arbitration. This Court has explained that delegation clauses are simply "additional, antecedent agreement[s]" to arbitrate that must be enforced the same as any other arbitration agreement. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010).

The FAA must be interpreted against the background principle that a bargained-for arbitration agreement is enforceable so long as the agreement is "susceptible of an interpretation that covers the asserted dispute." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986). This exacting standard is necessary because courts must pay "due regard" to the liberal "federal policy favoring arbitration." *DirecTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (citation omitted); *see also Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 338 (2011). The First Circuit's refusal to enforce the parties' bargained-for delegation clause in this case flouts this Court's commands, usurping the authority to decide an important arbitrability issue notwithstanding the parties' express agreement that an arbitrator should resolve the issue.

II. The text, historical context, and purpose of the FAA leave no doubt that "contracts of employment" exempted from arbitration under Section 1 include only those agreements that purport to establish an employer-employee relationship under common-law agency principles, and not independent-contractor agreements.

A. At the time the FAA was enacted, just as today, the plain meaning of the term "contracts of employment" encompassed only contracts between an *employer* and an *employee* that stated the terms and conditions of *employment*. The distinction between employees and independent contractors goes back centuries and was well understood when Congress enacted the FAA. In fact, Congress used terms such as "employer," "employee," and "employment" in numerous contemporaneous statutes for the express purpose of distinguishing common-law employees from independent contractors. Reading "contracts of employment" to include independent contractor agreements contradicts the plain language of the statute, frustrates the statute's purpose, and violates the Court's admonition that the Section 1 exemption be given a narrow and precise reading.

B. The determination of whether a contract is a "contract of employment" or something else (such as an independent-contractor agreement) for purposes of Section 1 of the FAA must be made by looking only at the relationship described within the four corners of the contract. No discovery or mini-trial into the nature of the parties' interactions is necessary or appropriate under the FAA.

C. The Independent Contractor Operator Agreements executed between New Prime and respondent plainly are *not* contracts of employment—not only by

virtue of their express declaration of intent "to establish an independent contractor relationship at all times," J.A. 65; *see also id.* at 86, but also because they grant respondent the authority to choose the method and manner in which he performs his work, to refuse any work at his discretion, to hire others to perform his work for him, and to work for other trucking companies. In fact, respondent entered into the agreements as proprietor of his own limited liability company, Hallmark Trucking LLC. Because the Section 1 exemption is inapplicable to the contracts between New Prime and respondent, the court below should have compelled arbitration of the parties' dispute under the FAA.

ARGUMENT

I. APPLICABILITY OF THE FAA SECTION 1 EXEMPTION IS AN ARBITRABILITY ISSUE THAT THE PARTIES DELEGATED TO AN ARBITRATOR

It is undisputed that New Prime and respondent agreed to arbitrate all disputes arising out of their relationship, "including the arbitrability of disputes between the parties." J.A. 82; *id.* at 103. The question whether the FAA Section 1 exemption applies is a delegable arbitrability issue. Thus, the courts below should have enforced the parties' delegation clause and compelled the Section 1 dispute to an arbitrator.

A. Congress enacted the FAA in 1925 "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The Act "embodies [a] national policy favoring arbitration and places arbitration agreements on an equal footing with all other contracts." *Buckeye Check*

Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006). In fact, this Court's "cases place it beyond dispute that the FAA was designed to *promote* arbitration." *Concepcion*, 563 U.S. at 345 (emphasis added).

In light of this "emphatic federal policy in favor of arbitral dispute resolution," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), "where [a] contract contains an arbitration clause, there is a presumption of arbitrability," and "'[a]n order to arbitrate [a] particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *AT&T Techs.*, 475 U.S. at 650. "The burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies," *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 227 (1987), and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

A delegation clause is an "additional, antecedent agreement," and "the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center*, 561 U.S. at 70. This "flow[s] inexorably from the fact that arbitration is simply a matter of contract between the parties." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). "Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." *Id.* So long as the delegation is "clear and unmistakable," the court must enforce it. *Id.* at 944.

B. Here, it is undisputed that the parties agreed to a valid, clear, and unmistakable delegation clause:

> Any disputes arising under, arising out of or relating to this agreement, including . . . any disputes arising out of or relating to the relationship created by the agreement, and any disputes as to the rights and obligations of the parties, *including the arbitrability of disputes between the parties*, shall be fully resolved by arbitration.

J.A. 82 (emphasis added); *see also id.* at 102–03. As the district court found, "the parties do not contest that the two operating agreements [respondent] signed . . . contain valid delegation provisions," which encompass "the arbitrability of disputes between the parties." J.A. 145. And this Court has found similar language sufficiently clear and unmistakable to require arbitration of threshold questions of arbitrability. *See Rent-A-Center*, 561 U.S. at 66 (enforcing a delegation clause that provided that "[t]he Arbitrator . . . shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement . . . .").

Moreover, the Independent Contractor Operating Agreements expressly incorporate the AAA's Commercial Arbitration Rules. J.A. 82–83; *id.* at 103. Those rules provide that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." American Arbitration Association, *Commercial Arbitration Rules and Mediation Procedures* R-7 (Oct. 1, 2017).

This Court has repeatedly enforced AAA rules that are incorporated into an arbitration contract, as they are here. *See C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 419 n.1 (2001) (AAA rules "are not secondary interpretive aides that supplement [a] reading of the contract; they are prescriptions incorporated by the express terms of the agreement itself"); *AT&T Techs.*, 475 U.S. at 649.

Neither respondent nor the courts below disputed that the delegation clause at issue here covers, by its plain terms, the question whether the Operating Agreements are "contracts of employment" for purposes of Section 1. Nevertheless, both the district court and the First Circuit held that applicability of the Section 1 exemption is a non-delegable issue that cannot be submitted to arbitration no matter how clearly the parties intend to delegate the question. In the words of the First Circuit, the issue is "an 'antecedent determination' for the district court to make before it can compel arbitration" because "the district court can [compel arbitration] only if it has authority to act under the FAA," and if the Operating Agreements are "contracts of employment" within the meaning of Section 1, then "the FAA does not apply." J.A. 165–66 (quotation marks omitted).

The First Circuit's circular logic proves far too much. Threshold arbitrability issues are *always* questions that go to the court's authority to compel arbitration under the FAA—if they are decided against the party seeking to compel arbitration, then there is no enforceable arbitration agreement and the FAA is inapplicable. Yet courts routinely enforce delegation clauses and order arbitration of such threshold issues. For example:

- Where a party is coerced into signing an arbitration agreement, or where the arbitration agreement is unconscionable or otherwise invalid under state law, the agreement is null and void and the FAA does not apply. 9 U.S.C. § 2. Yet this Court and other courts routinely enforce delegation clauses to allow an arbitrator to decide whether an arbitration agreement is invalid by reason of coercion, unconscionability, or other state-law grounds. *See Buckeye Check Cashing*, 546 U.S. at 446 (compelling arbitration of threshold contention that arbitration agreement was void as illegally usurious); *Edwards v. Doordash, Inc.*, ___ F.3d ___, 2018 WL 1954090, at *5 (5th Cir. Apr. 25, 2018) ("[Plaintiff's] unconscionability arguments . . . should be addressed by the arbitrator").

- Where the underlying dispute between the parties falls outside the scope of the parties' arbitration agreement, the FAA has no force with respect to that dispute. Yet this Court and other courts routinely enforce delegation clauses to allow an arbitrator to decide whether the parties' underlying dispute falls within the scope of the arbitration agreement. *See Rent-A-Center*, 561 U.S. at 68–69 ("[P]arties can agree to arbitrate . . . whether their agreement covers a particular controversy."); *Portland Gen. Elec. Co. v. Liberty Mut. Ins. Co.*, 862 F.3d 981, 985–86 (9th Cir. 2017) ("question[] of the scope of the arbitration agreement . . . [is] delegated to the arbitrators"); *In re Checking Account Overdraft Litig. MDL No. 2036*, 674 F.3d 1252, 1256–57 (11th Cir. 2012) ("Under the delegation provision . . . the decision of whether Given's

claims are within the scope of the arbitration agreement is a decision for an arbitrator.")

- Where a non-signatory to an arbitration agreement seeks to enforce the agreement, and a party argues that the non-signatory is without such authority, a ruling against the non-signatory would mean the FAA does not apply. Yet this Court and other courts routinely enforce delegation clauses to allow an arbitrator to decide whether the non-signatory may enforce the agreement. *See Rent-A-Center*, 561 U.S. at 68–69 ("[P]arties can agree to arbitrate . . . whether the parties have agreed to arbitrate."); *Contec Corp. v. Remote Sol'n, Co.*, 398 F.3d 205, 209–10 (2d Cir. 2005) (considering "whether a non-signatory can compel a signatory to arbitrate under an agreement where the question of arbitrability is itself subject to arbitration," and concluding that the "purported right to enforce the 1999 Agreement is a matter of the Agreement's continued existence, validity and scope, and is therefore subject to arbitration under the terms of the arbitration clause"); *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473–74 (1st Cir. 1989) ("Whether the right to compel arbitration . . . was validly assigned to the defendants and whether it can be enforced by them against Apollo are issues relating to the continued existence and validity of the agreement," which "[t]he arbitrator should decide").

Indeed, the First Circuit's reasoning flies in the face of this Court's recent decision in *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421 (2017). In that case, the Kentucky Supreme Court refused to enforce an arbitration agreement entered into under a power of attorney, holding that "a power of

attorney could not entitle a representative to enter into an arbitration agreement without *specifically* saying so." *Id.* at 1426. The plaintiff defended the state court's clear-statement rule on the ground that it "affect[ed] only contract formation," and "the FAA has no application to contract formation issues" because the Act operates only once a court determines that a valid arbitration agreement has been formed. *Id.* at 1428 (quotation marks omitted). The Court disagreed, reasoning that the FAA "cares not only about the 'enforce[ment]' of arbitration agreements, but also about their initial 'valid[ity].'" *Id.* But if the FAA applies in determining whether an arbitration agreement *exists*, surely it must also apply in determining whether such an agreement is *enforceable* under Section 1. That is precisely the question at issue here.

These holdings follow from the settled fact that a delegation clause is an "additional, antecedent agreement" that must be enforced as a standalone contract. *Rent-A-Center*, 561 U.S. at 70. Because a delegation clause is a freestanding and severable agreement to arbitrate questions of arbitrability, a challenge to the enforceability of such an agreement must be "specific to" the delegation clause itself. *Id.* at 74. Where a party challenges a delegation clause *only* on grounds that would "render[] the *entire* Agreement invalid," the delegation clause is unaffected and the threshold arbitrability dispute must be compelled to arbitration. *Id.*

In this case, the only challenge to the delegation clause is that it falls within a "contract of employment" such that the entire agreement is exempted from the FAA under Section 1. But it is beyond dispute that the standalone delegation clause is not *itself* a "contract of employment." Thus, the FAA applies to

the delegation clause even if it ultimately does not apply to the parties' broader contract.

The First Circuit was correct that some issues cannot be delegated to the arbitrator. But those issues are identified *in the FAA itself*. *See* 9 U.S.C. § 4 (court must compel arbitration only once it is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue"). Respondent here does not challenge the elements of contract formation nor dispute that he has refused to submit his claims to arbitration. As a result, the district court was required to compel the parties to submit their threshold arbitrability dispute to arbitration under the plain terms of the delegation clause.

II. Section 1 Does Not Exempt Independent Contractor Agreements From The FAA

Section 1 exempts certain "contracts of employment" in the transportation sector from the provisions of the FAA. 9 U.S.C. § 1. Independent contractor agreements are not "contracts of employment" and thus do not fall within the Section 1 exemption.

A. Independent Contractor Agreements Are Not "Contracts of Employment"

The term "contracts of employment" in Section 1 means what it says: agreements that purport to establish an employer-employee relationship, not an independent contractor relationship. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985). "When statutory

language is plain . . . , that is ordinarily the end of the matter." *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 552–53 (1987) (quotation marks omitted).

1. The FAA provides that "nothing herein contained shall apply to *contracts of employment* of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (emphasis added). The meaning of the term "contracts of employment" was as plain in 1925, when the FAA was enacted, as it is today. Indeed, *Black's Law Dictionary* treats the term "contract of employment" as synonymous with "employment contract," a term that it traces back to 1927 and which means "[a] contract between an *employer and employee* in which the terms and conditions of *employment* are stated." *Black's Law Dictionary* 393 (10th ed. 2014) (emphasis added).

Moreover, at the time the FAA was enacted, it was well established that independent contractors were *not* employees, and that an independent contractor agreement did *not* establish employment. Bouvier's Law Dictionary explained this important distinction: "Strictly and etymologically, [employee] means 'a person employed,' but in practice . . . and as generally used with us, though perhaps not confined to any official employment, it is understood to mean *some permanent employment or position*." *Bouvier's Law Dictionary* 1035 (8th ed. 1914) (emphasis added). By contrast, "independent contractor" was defined as "[o]ne who . . . contracts to do a piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of his work." *Id.* at 1533.

When Congress chose the words "contracts of employment" in Section 1, it did so with full awareness

of the distinction between an employee and an independent contractor, and with an appreciation of the important legal consequences that attach to a worker's classification. "[T]he distinction between employees and independent contractors has deep roots in our legal tradition." *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721–22 (1996). And although the contours along which the law distinguishes these classes of workers have evolved with the economy, the distinction itself goes back centuries and has been a crucial element of regulations seeking both to promote growth and protect workers.

As early as the Ordinance of Labourers, enacted in 1349 in response to the labor-market dislocations occasioned by the bubonic plague, English law recognized fundamental differences between ordinary laborers and independent craftsmen and, consequently, subjected them to different regulatory schemes. For example, although that statute required "every man and woman" to work until age 60 and established strict wage controls, it exempted those "living in merchandise, []or exercising any craft, []or having of his own whereof he may live, []or proper land." *See* 23 Edw. III (1349).

By the time of Blackstone, an intricate taxonomy had developed, distinguishing master-servant relationships from other work relationships, and further distinguishing among master-servant relationships. *See* 1 William Blackstone, *Commentaries on the Laws of England* *422–32. These distinctions had profound legal importance. For example, a master could be held vicariously liable for the acts of his servants, but not for others with whom he contracted, and a master could "abet and assist his servant in any action at law

against a stranger; whereas, in general, it [wa]s an offense against public justice to encourage suits and animosities by helping to bear the expense of them." *See id.* at *429, 431.

With industrialization and its "accompanying explosion of new occupations and ways of organizing work," there came "a number of new or newly important issues that required differentiation between categories of workers whose degree of dependence made them more or less needful of protection, or made the public more or less needful of the employer's financial responsibility for risks associated with the work." Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One And How It Ought to Stop Trying*, 22 Berkeley J. of Emp. & Lab. L. 295, 303–04 (2001). It was during this period of rapid commercial development that the modern concept of the "independent contractor" took form.

The more specific legal "conception of an independent contractor, not so-called until later, dates back not much before *Bush v. Steinman*[, 126 Eng. Rep. 978], in 1799." James H. Wolfe, *Determination of Employer-Employee Relationships in Social Legislation*, 41 Col. L. Rev. 1015, 1020–21 (1941).[1] At that time, the distinction was largely relevant "in determining the scope of vicarious liability," and so courts naturally "embraced Blackstone's control rationale of *respondeat superior* as the logical test of the master-

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[1] "The definition of independent contractor originated from the phrase, 'independent calling' in the late 1800's," and "referred to the fact that an independent contractor was his own master." Jane P. Kwak, Note, *Employees versus Independent Contractors: Why States Should Not Enact Statutes That Target the Construction Industry*, 39 J. Legis. 295, 296 (2013).

servant relationship." John Bruntz, *The Employee / Independent Contractor Dichotomy: A Rose Is Not Always A Rose*, 8 Hofstra Lab. L. J. 337, 338–39 (1991). Thus, "[t]he right-to-control test" for distinguishing employees from independent contractors "was first developed in the mid-nineteenth century by English courts and was soon adopted by American courts." *Id.* at 339 (discussing *Boswell v. Laird*, 8 Cal. 469 (1857)).

By the turn of the twentieth century, the distinction between employees and independent contractors was omnipresent. As the Second Circuit observed in 1897, "[t]he fact of a distinction between the liability of an employer for an injury caused by the negligence of his employe[e] or his servant, and the liability of an owner for an injury caused by the negligence of an independent contractor . . . , was formerly not well recognized, but is now distinctly understood." *Atl. Transp. Co. v. Coneys*, 82 F. 177, 178 (2d Cir. 1897); *see also, e.g.*, *Nyback v. Champagne Labor Co.*, 109 F. 732, 741 (7th Cir. 1901) ("[U]pon the facts stated, and as they appear in this record, Barber was not an independent contractor, but a servant of the defendant."); *Thompson Caldwell Constr. Co. v. Young*, 294 F. 145, 146–47 (4th Cir. 1923) (distinguishing precedent on the ground that "[t]he defendant admits that its status was that of an independent contractor," and "[i]n the [earlier case], the defendant was an employee of the county, and not an independent contractor"); *Underwood Contracting Corp. v. Davies*, 287 F. 776, 780 (5th Cir. 1923) ("We do not think that [the contract] created the relation of master and servant between said bank and said defendant. The District Court did not err in construing it as constituting the Underwood Contracting Corporation an independent contractor."); *Swift & Co. v. Bowling*, 293 F. 279, 281 (4th Cir.

1923) ("Th[e] contract on its face made Cox an independent contractor" but "there was evidence on the part of the plaintiff tending to show that in the actual work the contract was disregarded, and that Cox acted and was treated by defendant as an employee.").

When the FAA was enacted in 1925, the distinction between employees and independent contractors—and the importance of that distinction—was so well recognized that it was shortly thereafter memorialized in the Restatements of Law. *See* Restatement (First) of Agency § 2, cmt. a (1933) ("The words 'master' and 'servant' are herein used to indicate the relationship from which arises the tort liability of an employer to third persons for the tort of an employee, and the special duties and immunities of an employer to the employee."); Restatement (First) of Torts § 409, cmt. a (1934) ("The words 'independent contractor' are used throughout this Topic as describing any person who does work for another under conditions which are not sufficient to make him a servant of the other.").

Even today, there are material differences between employees and independent contractors, "[w]hether it is a familiar claim such as an employer's liability for the tort of his alleged employee . . . or a less known advantage such as a preference under insolvency statutes or exemption of employees' wages from garnishment; or a comparative innovation such as the duty to pay social security taxes or to pay a statutory minimum wage." Gerald M. Stevens, *The Test of the Employment Relation*, 38 Mich. L. Rev. 188, 188 (1939). Indeed, "[t]he question of whether a worker is in fact an agent, servant, employee, or independent contractor is crucial in determining the hiring party's potential liability exposure in tort and under Title VII, as well as other federal statutes." Deanne M. Mosley &

William C. Walter, *The Significance of the Classification of Employment Relationships in Determining Exposure to Liability*, 67 Miss. L. J. 613, 642 (1998).

Given the long-entrenched and legally significant distinction between employees and independent contractors, it is generally assumed that a statute's use of the term "employee" is meant to incorporate the common-law master-servant relationship. As one commentator explained:

> "Employee," being derived from the verb "to employ," might have suggested application to persons engaged to render services. Instead "employee" served mainly as a near substitute for "servant," and it seems always to have been accepted by the courts that neither term extends to persons of "independent employment" or "independent contractors" as such persons came to be known.

Carlson, *supra*, 22 Berkeley J. Emp. & Lab. L. at 309–10.

Most notably, this Court declared in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), that "when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Id.* at 322–23. In fact, courts apply a "*presumption* that Congress means an agency law defini-

tion for 'employee' unless it *clearly indicates* otherwise." *Id.* at 325 (emphases added).[2] There is no such indication here.

The First Circuit brushed aside this overwhelming weight of authority, instead relying on contemporaneous case law in which courts used the term "contracts of employment" loosely to include any service arrangement. *See* J.A. 178–82. But the court acknowledged that those cases "d[id] not deal with the FAA." J.A. 181; *see Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932) ("Where the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different . . . the meaning well may vary to meet the purposes of the law.").

The First Circuit also cited lay dictionaries that, in its view, "confirm that the ordinary meaning of 'contracts of employment' in 1925 was agreements to perform work." J.A. 177–78. But those dictionaries did not purport to define the term "contracts of employment" at all. Rather, the court deconstructed the statutory term and cobbled together a meaning from the atomized definitions of its constituent parts. *See id.* (noting that one dictionary "defin[ed] 'contract' . . . as

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[2] *Darden* overruled earlier case law holding that the term "employee" might sweep more broadly than the common-law definition of a master-servant relationship. *Darden*, 503 U.S. 325. But notably, even those overruled cases did not entirely abandon the distinction between employees and independent contractors, as the First Circuit did here. *See, e.g.*, *NLRB v. Hearst Pubs.*, 322 U.S. 111, 124 (1944) ("Congress, on the one hand, was not thinking solely of the immediate technical relation of employer and employee. . . . It cannot be taken, however, that the purpose was to include all other persons who may perform service for another or was to ignore entirely legal classifications made for other purposes.").

'[a]n agreement between two or more persons to do or forbear something,'" "'employment' as '[a]n act of employing, or state of being employed,'" and "'employ' as '[t]o make use of the services of; to have or keep at work; to give employment to'") (citing *Webster's New Int'l Dictionary of the English Language* 488, 718 (1923)). This "technique of defining individual words in a vacuum fails to view the entire provision in context." *Chamber of Commerce of U.S. of Am. v. U.S. Dep't of Labor*, 885 F.3d 360, 372 (5th Cir. 2018).

2. The context in which the FAA uses the term "contracts of employment" bolsters the plain meaning of the text—that "contracts of employment" refers only to agreements that purport to create an employer-employee relationship.

Section 1 exempts only *certain* "contracts of employment" from the FAA: those of "seamen, railroad employees, and any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. As this Court has explained, Section 1 was drafted in that manner to preserve other statutory schemes that already contained alternative dispute resolution mechanisms for particular workers. "By the time the FAA was passed, Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their employers." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 (2001). Similarly, "grievance procedures existed for railroad employees under federal law, and the passage of a more comprehensive statute providing for the mediation and arbitration of railroad labor disputes was imminent." *Id.* Consequently, "[i]t is reasonable to assume that Congress excluded 'seamen' and 'railroad employees' from the FAA for the simple reason that it did not wish to unsettle established or developing statutory

dispute resolution schemes covering specific workers." *Id.*

Crucially, the alternative dispute resolution mechanisms established by these other statutes applied only to employees—and *not* independent contractors. For example, the Railway Labor Act expressly invokes the right-of-control test that distinguishes employees from independent contractors at common law: "The term 'employee' as used herein includes every person in the service of a carrier (*subject to its continuing authority to supervise and direct the manner of rendition of service*) who performs any work defined as that of an employee or subordinate official in the orders of the Surface Transportation Board." Railway Labor Act of 1926, May 20, 1926, c. 347, § 1, 44 Stat. 577, 45 U.S.C. § 151 (emphasis added). To avoid any doubt on that score, Congress drafted Section 1 of the FAA to apply only to "contracts of employment of . . . railroad *employees*." 9 U.S.C. § 1 (emphasis added).

Similarly, the Transportation Act provides that "[i]t shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort . . . to avoid any interruption to the operation of any carrier growing out of *any dispute between the carrier and the employees or subordinate officials thereof*." Transportation Act of 1920, § 301, 41 Stat. 469 (emphasis added). Tellingly, the Act imposes this duty not only on employees but also "agents" of the carrier—a term capacious enough to include independent contractors—yet limits the scope of the duty to disputes between "carrier[s] and the[ir] employees"—*not* agents or independent contractors.

The list goes on: The Federal Employers' Liability Act states that "every common carrier by railroad . . .

shall be liable in damages to any person suffering injury *while he is employed by such carrier*." Apr. 22, 1908, c. 149, § 1, 35 Stat. 65, 45 U.S.C. § 51 (emphasis added). The Jones Act provides that "any seaman who shall suffer personal injury *in the course of his employment* may, at his election, maintain an action for damages at law . . . and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply." June 5, 1920, c. 250, § 33, 66 Stat. 988, 1007, 46 U.S.C. § 30104 (emphasis added). And the Shipping Commissioners Act of 1872 commands that "every shipping-commissioner shall hear and decide any question whatsoever between a master, consignee, agent, or owner, and any of his crew, which both parties agree in writing to submit to him." June 7, 1872, c. 322, § 25, 17 Stat. 262, 267.

In short, although the First Circuit speculated that it would have been "strange" for Congress to draw a distinction in Section 1 between employees and independent contractors because both categories of workers "play the same necessary role in the free flow of goods," J.A. 181–82, Congress drew precisely that distinction in numerous contemporaneous statutes addressing alternative dispute resolution in the transportation sector, and the Section 1 exemption was drafted to preserve those statutes.

Because the "enumerated categories of workers" include only employees, the "other class of workers" addressed in Section 1's residual clause should similarly be limited to employees. *See Circuit City*, 532 U.S. at 114–15, 121 ("The wording of § 1 calls for the application of the maxim *ejusdem generis*"; thus, the residual clause—"any other class of workers engaged in foreign or interstate commerce"—"should be read to

give effect to the terms 'seamen' and 'railroad employees,' and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it."). Consequently, it would make little sense to read the term "contracts of employment" to include independent contractor agreements—contracts those workers would not have signed.

3. This Court's two prior cases interpreting the Section 1 exemption further confirm this interpretation of "contracts of employment." In *Circuit City*, for example, the Court rejected the proposition that the term "contracts of employment of . . . any other class of workers engaged in foreign or interstate commerce" included *all* such workers, instead holding that "Section 1 exempts from the FAA only contracts of employment of *transportation* workers." 532 U.S. at 119, 121 (emphasis added). As the Court explained, the "pro-arbitration purposes of the FAA . . . compel that the § 1 exclusion provision be afforded a narrow construction." *Circuit City*, 532 U.S. at 115, 118. "[T]he fact that the provision is contained in a statute that 'seeks broadly to overcome judicial hostility to arbitration agreements'" demands a "precise reading of a provision that exempts contracts from the FAA's coverage." *Id.* at 118–19 (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272–73 (1995)). Indeed, "it would be incongruous to adopt . . . a conventional reading of the FAA's coverage in § 2 in order to implement proarbitration policies and an unconventional reading of the reach of § 1 in order to undo the same coverage." *Id.* at 122; *see also Gilmer*, 500 U.S. at 25 n.2 (interpreting the term "contract[] of employment" narrowly to include only the written agreement between the employer and employee and not a related agreement).

4. The First Circuit's broad interpretation of "contracts of employment" would have profound, deleterious consequences for both the trucking industry and the wider economy, upsetting reliance interests, depriving transportation workers of efficient dispute resolution, and increasing the cost of business in a field that touches every sector of the American economy. These are the very consequences the FAA is designed to avoid.

Independent contractors are a large and important part of the interstate trucking industry. Because "[d]emand for a motor carrier's services may fluctuate seasonally or day by day," independent contractors are critical to "[k]eeping expensive equipment operating at capacity, and avoiding the waste of resources attendant upon empty backruns and idleness." *Transamerican Freight Lines, Inc. v. Brada Miller Freight Sys.*, 423 U.S. 28, 35 (1975). As a result, for decades "[c]arriers . . . have increasingly turned to owner-operator truckers to satisfy their need for equipment as their service demands." *Am. Trucking Ass'n v. United States*, 344 U.S. 298, 303 (1953).

Today, more than half a million trucks are primarily operated by independent contractors. *See* U.S. Census Bureau, *2002 Vehicle Inventory and Use Survey* 15, 39 (Dec. 2004), http://www.census.gov/prod/ec02/ec02tv-us.pdf. Some of these independent contractors operate as sole proprietorships, some (like respondent) as small independent businesses, and others as larger corporations in which the owner who executes the independent contractor agreement does not personally perform any of the work under the agreement, but rather hires others to do so. Indeed, New Prime began as a single-truck operation and grew into an industry leader. *See* Prime

Inc. Company History, http://www.primeinc.com/company-history.

Although some independent contractors may find advantage in a rule that refuses to enforce their agreements to arbitrate, it is just as likely that such a rule would hurt those workers. The drafters of the FAA recognized that "[t]he settlement of disputes by arbitration appeals to big business and little business alike, to corporate interests as well as to individuals." S. Rep. No. 68-536 at 3 (1924). But the First Circuit's rule would deprive all independent contractors engaged in transportation of a cost-effective means of resolving their disputes, instead forcing them to submit to a judicial process that is often "slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 563 U.S. at 348. For many such individuals and small businesses, the cost of litigation in a judicial forum is prohibitive. For these independent contractors, "it looks like arbitration—or nothing." Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J. L. Reform 783, 792 (2008).

B. "Contracts Of Employment" Must Be Identified By The Terms Of The Contract Alone

In determining whether a particular agreement is a "contract of employment" for purposes of Section 1, the FAA compels a factfinder to take a "categorical approach that focuses solely on the words of the contract and the definition of the relevant category." *In re Swift Transp. Co.*, 830 F.3d at 920 (Ikuta, J., dissenting); *contra* J.A. 151 (district court ordering "factual discovery on the threshold question of the plaintiff's status as an employee or independent contractor"). If

the relationship described in the contract is that of an independent contractor, then the Section 1 exemption does not apply.

As noted above, Section 1 provides that "nothing herein contained shall apply to *contracts of employment*." 9 U.S.C. § 1 (emphasis added). The object of that sentence is the contract itself, not the de facto relationship between the parties. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 n.9 (1967) (noting that certain "*categories of contracts* otherwise within the Arbitration Act" are excluded under Section 1) (emphasis added). Had Congress meant for the Section 1 exemption to turn on the nature of parties' interactions, rather than the legal relationship described in their contract, it would have used far different language—just as it did in the very next section of the FAA. Unlike Section 1, Section 2 provides that "[a] written provision in any maritime transaction or a contract *evidencing a transaction* involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2 (emphasis added). It is this additional language in Section 2—"evidencing a transaction"—that authorizes a court to look beyond the four corners of the contract to the economic realities of the parties' interactions.

As the Court explained in *Allied-Bruce*, "'evidencing a transaction' mean[s] . . . that the transaction (that the contract 'evidences') must turn out, *in fact*, to have involved interstate commerce." 513 U.S. at 277 (emphasis in original). In reaching this decision, the Court relied on *Bernhardt v. Polygraphic Company of America*, 350 U.S. 198 (1956), which concluded that a contract did not "evidence 'a transaction involving commerce' within the meaning of § 2 of the Act"

because "[t]here [wa]s no showing that petitioner *while performing his duties under the employment contract* was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce." *Id.* at 200–01 (emphasis added).

Reading the term "contracts of employment" in Section 1 to require the same inquiry into the economic realities of the parties' relationship, as the district court did below, would ignore this important textual distinction, rendering the "evidencing a transaction" language in Section 2—critical to this Court's holdings in *Bernhardt* and *Allied-Bruce*—mere surplusage. *See Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."). It also would undermine the FAA for several other reasons:

First, in the context of a misclassification suit (like this one), the employment status of the worker is the merits question at issue; once it is determined whether the worker is an employee or independent contractor, there is often nothing left to adjudicate. Thus, "requiring the parties to litigate the underlying substance of [a putative employee's] claim[s]" as part of the Section 1 inquiry "risks depriving [the defendant] of the benefits of its contract" and destroying the arbitration agreement. *In re Swift*, 830 F.3d at 920 (Ikuta, J., dissenting). Such an approach would contravene this Court's admonition that, "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claim." *AT&T Techs.*, 475 U.S. at 649.

Second, inquiring into the factual relationship between the parties under Section 1 could yield different results under the same contract. Although two workers may have signed the same independent contractor agreement, one may be compelled to arbitrate his claims whereas the other may not, based solely on the evidence of their interactions with the putative employer. In fact, the *same worker* may be compelled to arbitrate at one point in time, but allowed to proceed in court at another point in time, if his relationship with the putative employer is found to have evolved in the interim.

Third, an interpretation of Section 1 that requires a factfinder to evaluate the parties' underlying relationship would create countless complexities every time a putative employer moves to compel arbitration. "There is no question that the common-law agency test makes for difficult line drawing," *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 509 (D.C. Cir. 2009), and this Court has recognized that "[t]here are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor." *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968). Requiring a court or arbitrator to undertake this analysis simply to determine whether a dispute should be compelled to arbitration would create "considerable complexity and uncertainty" that "would call into doubt the efficacy of alternative dispute resolution procedures" and "undermin[e] the FAA's proarbitation purposes [by] 'breeding litigation from a statute that seeks to avoid it.'" *Circuit City*, 532 U.S. at 123 (quoting *Allied-Bruce*, 513 U.S. at 275).

Instead, applicability of the Section 1 exemption should be "clear on the face of the contract" and "require[] only the examination of its terms." *In re Swift*, 830 F.3d at 920 (Ikuta, J., dissenting).

C. Respondent's Operating Agreements Are Not "Contracts Of Employment"

Should this Court decide to adjudicate the applicability of the Section 1 exemption to the claims at issue here, rather than delegate that question to an arbitrator, it should hold that respondent's Independent Contractor Operating Agreements are not contracts of employment.

Because Congress did not articulate a specific meaning of the term "contracts of employment" in the FAA, "the conventional master-servant relationship as understood by common-law agency doctrine" applies. *Darden*, 503 U.S. at 322–23. "At common law the relevant factors defining the master-servant relationship focus on the master's control over the servant." *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448 (2003) (citing Restatement (Second) of Agency § 220(1) (1933)). These factors include, *inter alia*, "the extent of control which . . . the master may exercise over the details of the work," "whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work," and "the method of payment, whether by the time or by the job." Restatement (Second) of Agency § 220(2) (1933).

Under these common-law principles, the Operating Agreements—contractual arrangements between New Prime, Inc. and Hallmark Trucking LLC—

plainly set forth an independent contractor relationship. In addition to being captioned "Independent Contractor Operating Agreements," the contracts declare in no uncertain terms that their purpose is "to establish an independent contractor relationship at all times." J.A. 65; *see also id.* at 86. And the Operating Agreements' terms support that characterization. They provide respondent with broad control over the details of his work, stating that he "shall determine the means and methods of performance of all transportation services undertaken under the terms of this Agreement, including driving times and delivery routes." J.A. 86; *see also id.* at 65. They permit respondent either to "drive the Equipment Yourself," "employ . . . drivers for the Equipment," or "lease drivers for the Equipment." J.A. 70; *id.* at 91. They permit respondent to "refuse to haul any load offered to [him] by [New] Prime." J.A. 65; *id.* at 86. And they expressly reserve to respondent "the right to provide services for another carrier during the term of th[e] Agreement[s]." *Id.* Respondent also supplies the instrumentalities of work under the Independent Contractor Operating Agreements: "You are willing to lease the following-described tractor (the 'Equipment') to Prime for the purpose of hauling freight pursuant to the terms and conditions of the Agreement." J.A. 64; *id.* at 85. And respondent is paid by the job, rather than time worked. *See* J.A. 65–66; *id.* at 86–87.

Such terms are the hallmarks of an independent contractor agreement, not a "contract of employment."

CONCLUSION

The judgment of the Court of Appeals for the First Circuit should be reversed.

Respectfully submitted.

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In The Supreme Court of the United States

NEW PRIME, INC.,

Petitioner,

v.

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On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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QUESTIONS PRESENTED

By its terms, the Federal Arbitration Act (FAA) does not apply to the "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. When the Act was passed, the ordinary meaning of the phrase "contracts of employment" was agreements to perform work. Nevertheless, Petitioner argues that for purposes of the FAA, "contracts of employment" should be defined as agreements to perform work that evidence on their face a master-servant relationship under the common law of agency, regardless of the actual nature of the employment relationship. The questions presented are:

1. Must a court compel arbitration under the FAA before determining whether the contract at issue is a transportation worker's "contract of employment" to which the FAA does not apply?

2. Should the phrase "contracts of employment" as used in the FAA be given its ordinary meaning at the time the Act was passed—agreements to perform work—or should it be defined as agreements to perform work that evidence on their face a master-servant relationship under the common law of agency, regardless of the actual nature of the employment relationship?

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INTRODUCTION

"The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017). The Federal Arbitration Act prohibits courts from applying the statute to the "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. When the FAA was passed, the ordinary meaning of these words was that the statute does not apply to transportation workers' agreements to perform work. Case law, statutes, administrative rulings, treatises, even actual contracts, contemporary with the passage of the FAA all used the phrase "contract of employment" as a general term for *any* work agreement—including that of an independent contractor.

Petitioner New Prime, Inc. is a trucking company. Respondent Dominic Oliveira is a long-haul truck driver. The contract between them—for Oliveira to work for Prime hauling freight—is indisputably a transportation worker's agreement to perform work. The FAA, therefore, does not apply.

Prime attempts to avoid this outcome by asking this Court to do a series of extraordinary things. First, Prime argues the Court should avoid the issue altogether by holding that courts must rely on the FAA to compel arbitration of the question whether the FAA applies in the first place. That makes no sense. Courts can't rely on laws that don't apply. So of course, they

must determine whether the FAA applies *before* using it to compel arbitration.

Next, Prime asks this Court to adopt an interpretation of the FAA that has no basis in what its words meant when the law was enacted. Rather than giving the phrase "contracts of employment" its ordinary meaning at the time the statute was passed—agreements to perform work—Prime argues that for purposes of the FAA, "contracts of employment" should be defined as agreements to perform work that describe a master-servant relationship, regardless of whether such a relationship in fact exists. Accepting Prime's argument would require this Court to set aside longstanding black-letter law that statutory text is to be given its ordinary meaning at the time it was enacted.

And, as if that weren't enough, Prime's interpretation would also require this Court to hold that employers can avoid the transportation-worker exemption simply by labeling—or mislabeling—their workers independent contractors, regardless of whether they actually are. No federal law permits employers to circumvent its strictures by illegally misclassifying their workers. There is no reason the FAA should be any different.

This Court should decline Prime's invitation to rewrite the principles of statutory interpretation. And it should decline its invitation to rewrite the FAA.

STATEMENT OF THE CASE

A. Statutory Background

The FAA governs arbitration provisions in maritime contracts and contracts involving commerce. 9 U.S.C. § 2. Such provisions, the Act states, "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* But there's an exception to this mandate: The Act provides that "nothing" in the statute "shall apply to the contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.

The historical and statutory context in which the FAA was enacted is essential to understanding Congress' concern with transportation workers and why it specifically exempted them from the statute.

Beginning in the late nineteenth century, labor disputes in the transportation industry had repeatedly crippled interstate commerce and endangered the public. During the Pullman Strike of 1894, for example, tens of thousands of workers went on strike, and violence broke out in several cities, paralyzing the railroad system. *See* A.P. Winston, *The Significance of the Pullman Strike*, 9 J. Polit. Econ. 540, 541-42 (1901); Almont Lindsey, The Pullman Strike 239-40, 254 (1942). In 1921, a nationwide strike by sailors and longshoremen shut down ports for weeks. *See* David Montgomery, The Fall of the House of Labor: The Workplace, the State, and American Labor Activism 1865-1925 403

(1987). In 1922, a railroad strike threatened to shut down major industries as 400,000 railroad shopmen refused to work. Margaret Gadsby, *Strike of the Railroad Shopmen*, 15 Monthly Lab. Rev., no. 6, Dec. 1922, at 2, 6.

And these were not the only incidents of labor unrest. The early twentieth century saw over one hundred strikes in the railroad industry alone. *See* Paul Stephen Dempsey, *Transportation: A Legal History*, 30 Transp. L.J. 235, 273 (2003).

In an attempt to mitigate this ongoing strife, Congress repeatedly enacted dispute resolution statutes governing transportation workers that it hoped would obviate the need for strikes. These statutes defined the workers to whom they applied by their function in the industry—not their employment status. The Shipping Commissioners Act, for example, authorized shipping commissioners to resolve disputes between a "master, consignee, agent, or owner" of a ship "and *any* of his crew." Shipping Commissioners Act of 1872, ch. 322, § 25, 17 Stat. 262, 267 (emphasis added). Similarly, the Erdman and Newlands Acts provided dispute resolution procedures applicable to "all persons actually engaged in *any* capacity in train operation or train service of any description." Erdman Act, ch. 370, 30 Stat. 424, 424 (1898) (emphasis added); Newlands Act, ch. 6, 38 Stat. 103, 104 (1913).

Of particular relevance is the Transportation Act of 1920, which governed dispute resolution in the railroad industry when the FAA was passed. The

Transportation Act created a federal Railroad Labor Board to resolve labor disputes, with the goal of preventing the unrest that had previously gripped the industry. *See* §§ 304, 307, 41 Stat. 456, 470-71; *Railway Employees' Dep't, A.F.L. v. Indiana Harbor Belt R.R. Co.*, Decision No. 982, 3 R.L.B. 332, 337 (1922).

Like previous railway dispute resolution statutes, the Transportation Act applied to *all* "those engaged in the customary work directly contributory to the operation of the railroads"—including independent contractors. *Indiana Harbor*, 3 R.L.B. at 337; *see United Bhd. of Maint. of Way Emps. & Ry. Shop Laborers v. St. Louis-San Francisco Ry. Co.*, Decision No. 1230, 3 R.L.B. 700, 702 (1922). In fact, the Railroad Labor Board repeatedly *rejected* the contention that railroads could avoid the Act by outsourcing work to contractors. *See, e.g.*, *Indiana Harbor*, 3 R.L.B. at 337; *St. Louis-San Francisco Ry. Co.*, 3 R.L.B. at 702.

As the Board explained, it would be "absurd to say that" railroads and their workers could not "interrupt commerce by labor controversies unless the operation of the roads was turned over to contractors, in which event the so called contractors and the railway workers might engage in industrial warfare ad libitum." *Indiana Harbor*, 3 R.L.B. at 337. A strike by independent contractors or their employees "would as effectually result in an interruption to traffic as if the men were the direct employees of the carrier." *Id.* at 338.

It was against this backdrop that Congress passed the FAA—a statute that requires courts to enforce

private contracts between individual workers and their employers about how they will resolve their disputes. *See* 9 U.S.C. § 2. Congress exempted transportation workers from the FAA's coverage "to ensure that workers in general would be covered by the provisions of the FAA, while reserving for itself more specific legislation for those engaged in transportation," *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 (2001). Thus, the FAA provides that it "shall" not apply to "*any* . . . class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (emphasis added).

This language ensured that *all* transportation workers would continue to be subject to the dispute resolution statutes Congress had so painstakingly enacted in the years preceding the FAA—and open to any dispute resolution procedures Congress might pass in the future.

B. Factual Background.

1. Prime is a national trucking company that recruits workers by advertising a "paid apprenticeship" in which new recruits haul goods alongside experienced Prime drivers. J.A. 154. Federal regulations limit the number of hours one person may drive in a single stretch, so by putting two drivers in each truck, Prime's apprentice program allows Prime trucks to remain on the road for longer periods of time—and therefore operate more efficiently. J.A. 154 n.2.

Prime, however, does not pay its "apprentices" for their work. J.A. 136. In fact, Prime actually *charges*

drivers to work as "apprentices"—debt that's only forgiven if a driver works for the company for at least a year. J.A. 155.

After driving 10,000 miles as "apprentices," Prime drivers are then labeled "driver trainees." J.A. 154-55. "Trainees" are paid only fourteen cents per mile—far less than minimum wage. J.A. 136.

Only once "driver trainees" have completed 30,000 miles (and a week of unpaid orientation), are they finally eligible to become regular Prime drivers. J.A. 136. Prime classifies its regular drivers as either "company drivers" or "independent contractors." *Id.* Although these drivers perform identical work, Prime offers a $100 bonus to be labeled an "independent contractor." J.A. 118-19, 136.

2. Oliveira first joined Prime through its apprenticeship program. After completing 10,000 miles as an apprentice—paid nothing—and 30,000 miles as a driver trainee—paid far less than minimum wage—Oliveira finally became a regular Prime driver. J.A. 154-57. Although his work was the same as that of a company driver—drivers Prime admits are common-law servants—Prime classified Oliveira as an independent contractor. J.A. 157-58.

To make this happen, Prime first directed Oliveira to Abacus Accounting, which created an LLC on his behalf. J.A. 155. It then directed him to Success Leasing, which leased him a truck. J.A. 156. And finally, Success directed him to Prime's company store to purchase fuel and necessary equipment—equipment that cost

roughly $5,000. J.A. 138. Although Abacus, Success, and Prime are ostensibly separate companies, they are all in Prime's building, and Oliveira made all payments to Prime via deductions from his paycheck—even if they were technically owed to one of these other companies. J.A. 138-39, 155-56.

In fact, it was Success that presented Oliveira with his employment paperwork—labeled by Prime "Independent Contractor Operating Agreement." J.A. 156. Oliveira was not permitted to negotiate this agreement, and he "felt pressure" to sign it quickly because Prime told him it already had a load waiting for him. J.A. 118, 156.[1]

The Operating Agreement required Oliveira to lease the truck he had just leased from Success *back* to Prime for free for Prime's "exclusive" use and to drive that truck for Prime, with the rate of payment for such work set by the company. J.A. 64-65. The Agreement also contained an arbitration provision, which stated that disputes between the parties, including disputes about "arbitrability," would be resolved by arbitration. J.A. 82.

Although the Operating Agreement labeled Oliveira an independent contractor, Prime exercised substantial control over his work. The company controlled Oliveira's schedule; required him to take its

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[1] The following year, Oliveira and Prime entered into another Operating Agreement. J.A. 156 n.3. Because the relevant language in these agreements is identical, this brief refers to them together as the "Operating Agreement."

training courses and follow its procedures; limited which shipments Oliveira could take; set the rate of payment for those shipments; retained the right to fire Oliveira without cause; and rendered him unable to work for any other trucking company. J.A. 119, 138, 157.

Still, Prime did not pay Oliveira minimum wage. J.A. 110. Prime made regular deductions from Oliveira's paycheck—for fuel, "lease payments" on the truck, and equipment the company required him to buy. J.A. 138. Due to these deductions, Oliveira's paycheck was, on several occasions, actually negative. J.A. 120-21. That is, Prime sometimes *charged* Oliveira hundreds of dollars to work for the company. *Id.*

Because Prime did not consistently pay him minimum wage, Oliveira eventually left the company. J.A. 157. The following month, however, Prime re-hired Oliveira, this time labeling him a "company driver." J.A. 157-58. Oliveira's work—and Prime's control over that work—was no different than when he was labeled an "independent contractor." J.A. 158. And because Prime continued to deduct "lease payments" from his paycheck, Oliveira continued to be paid less than minimum wage. J.A. 139.

C. Proceedings Below

On March 4, 2015, Oliveira sued Prime under state and federal law for failing to pay him—and other similarly situated Prime drivers—minimum wage. J.A. 28, 127-30. Prime moved to compel arbitration of

Oliveira's claims. J.A. 158. The company relied solely on the FAA, expressly disclaiming any reliance on state law. *See* First Circuit Appendix 157, *Oliveira v. New Prime, Inc.*, No. 15-2364 (1st. Cir. Mar. 10, 2016).

The district court denied Prime's motion. J.A. 151. The court held that before it could rely on the FAA to enforce any arbitration provision in the Operating Agreement, it must first determine whether the Agreement is a transportation worker's "contract of employment" to which the FAA does not apply. J.A. 150-51. The court assumed that this determination depended on whether Oliveira was, in fact, an independent contractor. J.A. 141, 151. It therefore denied Prime's motion to compel arbitration without prejudice to permit discovery on that issue. J.A. 151.

The First Circuit affirmed, but held that no discovery was required. J.A. 187. Like the district court, the Court of Appeals held that before compelling arbitration pursuant to the FAA, courts must first determine whether the contract containing the arbitration provision is subject to the statute. J.A. 168. To determine whether the Operating Agreement is a "contract of employment" exempt from the FAA, the court reviewed in depth the text and history of the transportation-worker exemption. J.A. 177-86. After considering numerous sources contemporary with the statute, the court concluded that, when the FAA was enacted, the phrase "contracts of employment" meant agreements to perform work—including the work agreements of independent contractors. *Id.* Because the Operating Agreement is indisputably a transportation worker's

agreement to perform work, the First Circuit held that it is a "contract of employment" exempt from the FAA. J.A. 187.

Judge Barbadoro concurred in part and dissented in part. J.A. 187. He agreed with his co-panelists that a court, not an arbitrator, must decide whether the FAA applies. *Id.* He also stated that he did not "dissent . . . to take issue with the [panel's] reasoning" in interpreting the FAA. J.A. 192. In his view, however, the panel should have waited to determine whether the transportation-worker exemption applies to independent contractors until *after* the district court had determined whether Oliveira was, in fact, an independent contractor. J.A. 191-92.

SUMMARY OF ARGUMENT

The FAA is emphatic: "*[N]othing* herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (emphasis added).

Courts, of course, may not rely on laws that don't apply. A court, therefore, must determine whether a contract is a transportation worker's "contract of employment"—and thus whether the FAA applies to it—*before* relying on the statute to enforce any arbitration provision the contract contains.

Prime attempts to evade this requirement by asking this Court to enforce its delegation clause—an agreement to arbitrate disputes about arbitrability—rather than its substantive arbitration provision. But a delegation clause is nothing more than a specific kind of arbitration clause. And the FAA prohibits courts from using the statute to enforce *any* arbitration clause contained in a transportation worker's contract of employment. There is no exception for delegation clauses. Thus, Prime's contention that courts must rely on the FAA to enforce a delegation clause before determining whether the statute even applies not only defies logic—it defies the plain text of the FAA. Like any other statute, courts must decide whether the FAA applies *before* they apply it.

The FAA does not apply here. The fundamental principle of statutory interpretation is that a statute must be given its "ordinary, contemporary, common meaning at the time Congress enacted" it. *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (quotation marks and alteration omitted). The FAA does not apply to transportation workers' "contracts of employment." 9 U.S.C. § 1. In 1925, when the statute was passed, the ordinary meaning of the phrase "contracts of employment" was agreements to perform work. Case law, statutes, administrative decisions, treatises, and even actual contracts, contemporary with the passage of the statute, all used "contracts of employment" as a general term to refer to *all* work agreements—including those of independent contractors.

Prime does not cite a single source contemporary with the FAA that says otherwise. Instead of looking to the ordinary meaning of the statutory text when the FAA was enacted in 1925, Prime relies on a dictionary published in *2014*. And rather than the actual phrase Congress used—"contracts of employ*ment*"—Prime relies on a different term—the word "employ*ee*." But statutes are interpreted according to their ordinary meaning *at the time they were enacted*—not a century later. And they are interpreted in accordance with the meaning of the words Congress *actually used*, not similar-sounding words it didn't. While the word "employee" in 1925 had multiple common meanings, the phrase "contracts of employment" had only one: agreements to perform work. The employment status of the worker was irrelevant.

The history, purpose, and statutory context of the transportation-worker exemption all support the conclusion that the FAA incorporates this ordinary meaning. By the time Congress passed the FAA, it had—for years—been trying to rein in the oftentimes violent and destructive labor unrest that plagued the transportation industry. To do so, Congress passed a series of dispute resolution statutes governing maritime and railroad workers. These statutes applied to *all* workers in the regulated industries, regardless of their employment status—after all, independent contractors can disrupt commerce just as well as common-law servants can. Congress exempted transportation workers from the FAA to avoid unsettling these dispute resolution schemes and to reserve for itself the ability to regulate

other transportation workers' disputes in the future. Given this purpose, it makes perfect sense that Congress exempted all transportation workers' agreements to perform work—not just those of common-law servants. If it hadn't, it would have disrupted the preexisting dispute resolution schemes it had worked so hard to enact—and limited its ability to regulate future disputes.

Prime recites an imaginary parade of horribles it claims will result if this Court does not limit the transportation-worker exemption to agreements that describe on their face a common-law master-servant relationship. But there's no reason to believe that enforcing the FAA's narrow exemption for transportation workers' employment agreements as written will have any negative impact whatsoever. Prime's countertextual interpretation, on the other hand, will cause a host of problems that the ordinary meaning avoids. For example, Prime's reading would require courts to apply the test for common-law servitude—ordinarily applied to the actual employment *relationship*—to the employment *contract* itself. This would be a difficult and, in many cases, impossible task. It would also allow employers who illegally misclassify their workers as independent contractors to circumvent the transportation-worker exemption, while companies that obey the law must abide by it. The plain meaning of the statute avoids these problems.

And, in any event, this Court's role is to enforce the text of statutes as written. If Prime believes it would be good policy to rewrite the FAA, it must direct its arguments to Congress, not this Court. The FAA means what it says: It does not apply to transportation workers' agreements to perform work. Prime's Operating Agreement is indisputably a transportation worker's agreement to perform work. The FAA, therefore, does not apply.

ARGUMENT

I. COURTS MUST DETERMINE WHETHER THE FAA APPLIES BEFORE RELYING ON IT TO COMPEL ARBITRATION.

Must a court determine whether the FAA applies before relying on the Act to compel arbitration? To state the question is to answer it. Courts can't rely on laws that don't apply.

A. This obvious truism is no different for the FAA. Indeed, this Court has repeatedly made clear that courts may not rely on the FAA to enforce an arbitration clause in a contract that isn't subject to the Act in the first place. *See, e.g.*, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 201-02 (1956). Under this Court's precedent, the "first question" a court must answer—*before* it can rely on the FAA to compel arbitration—is whether the FAA applies at all. *See Prima Paint*, 388 U.S. at 401.

The FAA commands that "*nothing* herein contained shall apply to contracts of employment" of transportation workers. 9 U.S.C. § 1 (emphasis added). Therefore, before a court can rely on the statute to enforce an arbitration provision, it must "first" determine whether the contract containing that arbitration provision is a transportation worker's "contract of employment." *See Prima Paint*, 388 U.S. at 401.

Prime cannot circumvent this requirement by asking this Court to enforce its delegation clause—an agreement to arbitrate questions about arbitrability—rather than its substantive arbitration provision. As Prime itself admits, a delegation clause is just a species of arbitration clause. *See Rent-A-Ctr., West, Inc. v. Jackson*, 561 U.S. 63, 70 (2010). And the FAA "operates"—or, in this case, doesn't operate—on "this additional arbitration agreement just as it does on any other." *Id.* Courts cannot rely on the FAA to enforce *any* arbitration provision contained in a transportation worker's contract of employment. The statute makes no exception for delegation clauses. Therefore, just as with any other arbitration clause, a court cannot use the FAA to enforce a delegation clause without "first" determining whether the contract that contains that delegation clause is a transportation worker's "contract of employment."

B. Prime asserts that its delegation clause demonstrates that the parties agreed to arbitrate disputes about whether the Operating Agreement is a "contract of employment" within the meaning of the

FAA. Pet. Br. 11-12. This assertion is both false and irrelevant.[2]

By its terms, Prime's delegation clause applies only to questions about the "arbitrability of disputes." J.A. 82. Arbitrability questions, this Court has explained, are questions about "whether the parties have submitted a particular dispute to arbitration." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). But whether the Operating Agreement is a "contract of employment" is not a question about whether the parties have submitted a particular dispute to arbitration; it's a question about whether the FAA applies to any such agreement.[3]

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[2] Prime falsely claims that "[n]either respondent nor the courts below disputed" this assertion. Pet. Br. 12. To the contrary, Oliveira argued below—and both lower courts agreed—that Prime's delegation clause does *not* cover the question whether the Operating Agreement is a transportation worker's "contract of employment." *See* J.A. 146-51, 161-68.

[3] Prime also argues that the mere statement in its Agreement that arbitration will be conducted under the rules of the American Arbitration Association further demonstrates that the parties agreed to arbitrate the question of whether the FAA applies. Pet. Br. 11. But these rules *do not* state that the arbitrator shall decide whether the FAA applies. They state that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction." American Arbitration Association, Comm. Arbitration Rules & Mediation Procedures, R-7. Whether the FAA applies is not a question of the *arbitrator's* jurisdiction. It's a question of the *court's* authority to compel arbitration.

Moreover, even if the court's authority could somehow be considered a question of the arbitrator's jurisdiction, a mere statement that arbitrators have the power to rule on a question—that is, that they *can* rule on a question *if* it is delegated to them—is

But even if the parties had agreed to arbitrate this question, it wouldn't change the outcome here. As this Court made clear in *Hall Street*, courts cannot ignore the limits the FAA places on their authority—even if the parties agree otherwise. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008). The scope of the statute is determined by the words Congress wrote, not the preferences of the litigants. *See id.*

Were it otherwise, parties could not only override the transportation-worker exemption; they could override *any* of the FAA's limits. Parties could force courts to compel arbitration in cases where the contract did not involve interstate commerce, or where the statute does not provide district courts jurisdiction. *See* 9 U.S.C. §§ 2, 4. That cannot be the law. *Cf. Vaden v. Discover Bank*, 556 U.S. 49, 62-63 (2009) (explaining that a federal court cannot compel arbitration unless it has subject matter jurisdiction over the underlying controversy).

Indeed, this Court has repeatedly decided for itself questions about whether it has the authority to compel arbitration under the FAA—even where the contract at issue contained a delegation clause. *See, e.g., CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 101-02 (2012) (deciding whether Credit Repair Organizations Act contained "a 'congressional command' that the FAA shall not apply"); Pets. Br. 7-8, *CompuCredit v.*

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not "clear and unmistakable" evidence that the parties in any particular case have, *in fact*, delegated that question, *Rent-A-Ctr.*, 561 U.S. at 79.

Greenwood, No. 10-948, 2011 WL 2533009, at *7-*8 (U.S. June 23, 2011) (quoting arbitration provision, including delegation clause); *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (reversing order compelling arbitration because "nothing in the statute authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement"); *id.* at 282 n.1 (reprinting arbitration provision, including delegation clause).

This case is no different. The whole point of the transportation-worker exemption is to *prohibit* courts from using the FAA to enforce arbitration clauses in transportation workers' contracts of employment. It doesn't matter, therefore, whether Prime's delegation clause covers questions about the applicability of the statute or not. If Prime's contract is a "contract of employment," its delegation clause—whatever its scope—is an arbitration provision in a transportation worker's employment contract. And the FAA prohibits courts from using the statute to enforce it.

C. Prime contends that regardless of what the statute says, this Court's case law prohibits courts from applying the transportation-worker exemption unless the arbitration provision—here, Prime's delegation clause—is "*itself* a 'contract of employment.'" *See* Pet. Br. 15-16. On this view, the exemption doesn't actually exempt anything at all. After all, no arbitration provision is *itself* a contract of employment.

Prime attempts to defend rendering the transportation-worker exemption a nullity by invoking the so-called "severability rule." This rule provides

that *where the FAA applies*, courts may not refuse to enforce an arbitration clause solely because the contract in which it is located is invalid. *See Prima Paint*, 388 U.S. at 403-04. But the issue here is not whether Prime's Operating Agreement is *invalid*. The issue here is whether the Agreement is subject to the FAA.

And the text of the FAA itself makes clear that the severability rule does not govern that question. The severability rule stems from § 2 of the statute, which provides that an arbitration provision "*in any maritime transaction or a contract evidencing a transaction involving commerce . . .* shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2 (emphasis added). *See Rent-A-Center*, 561 U.S. at 70. As this Court explained in *Rent-A-Center*, this provision mandates that arbitration clauses in certain kinds of agreements are enforceable, without "mention of the validity of" those agreements. *Id.*

But, by its terms, § 2 applies only to certain kinds of contracts. *See* 9 U.S.C. § 2. And thus, a court must determine whether the contract at issue is subject to § 2 *before* applying the severability rule. *See, e.g.*, *Preston v. Ferrer*, 552 U.S. 346, 354 (2008) (holding severability rule applied because contract was subject to FAA); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) ("The effect of [§ 2] is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement *within the coverage of the Act.*" (emphasis added)); *Prima Paint*, 388 U.S. at 402-04 (applying severability rule only after

"[h]aving determined that the contract in question is within the coverage of the Arbitration Act").

The transportation-worker exemption mandates that the contracts to which § 2 (and the rest of the FAA) applies "shall" *not* include the "contracts of employment" of transportation workers. 9 U.S.C. § 1. Thus, a court must determine whether Prime's Operating Agreement is a transportation worker's "contract of employment" *before* applying § 2—and before applying its severability rule. Prime's argument to the contrary—that this Court must sever the delegation clause to determine whether the FAA applies in the first place—"puts the cart before the horse and makes no sense." J.A. 165 (quotation marks omitted).[4]

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[4] Prime also misunderstands the way the severability rule works, even where it does apply. The rule prohibits courts from invalidating arbitration provisions *solely* because the contract as a whole is invalid. But the rule does not require courts to enforce arbitration provisions that are themselves invalid, just because the contract as a whole—or another contractual provision—is *also* invalid for the same reason. Were it otherwise, a delegation clause within an arbitration provision that expressly required a biased arbitrator would be unchallengeable, because the bias would apply both to the delegation clause and to the substantive arbitration provision. A person forced to enter a contract at gunpoint could not argue that its arbitration provision was unenforceable because its argument against the validity of the arbitration clause—the gun to the head—would apply equally to the contract as a whole. Nothing in this Court's case law requires that absurd outcome. *See Rent-A-Center*, 561 U.S. at 74 (distinguishing argument that arbitration clause is unenforceable because contract as a whole is invalid from argument that a ground of invalidity—that might also apply to the contract as a whole—"as applied to" the specific arbitration clause at issue renders *that arbitration clause* unenforceable); *Granite Rock Co. v. Int'l Bhd. of Teamsters*,

This Court's decision in *Kindred* is not to the contrary. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017). *Kindred* held that, by its terms, the FAA applies to questions about whether an arbitration agreement was validly formed. *See id.* at 1428. That case has nothing to do with this one. By its terms, the FAA does *not* apply to arbitration provisions in the "contracts of employment" of transportation workers.

D. Prime wrongly asserts that *all* threshold issues go to whether the FAA applies—and so, Prime suggests, if courts were always required to determine whether the FAA applies before using the statute to enforce a delegation clause, courts could never enforce delegation clauses. Pet. Br. 12. Prime's own case law demonstrates this contention is meritless: In the very cases Prime cites, courts confirmed the FAA applied *before* enforcing a delegation clause. *See, e.g.*, *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 208 (2d Cir. 2005); *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 472 (1st Cir. 1989).

Prime's mistake is that it assumes that if there is "no *enforceable* arbitration agreement," the FAA does not apply at all. Pet. Br. 12 (emphasis added). Based on this false assumption, Prime argues that any threshold issue that could render an arbitration agreement unenforceable would also render the FAA "inapplicable." *Id.* But the FAA is not limited to *enforceable*

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561 U.S. 287, 297, 299 (2010) (formation issues—which often affect the contract as a whole in the same way as the arbitration agreement—are always for the court to decide).

arbitration agreements. The point of the FAA is to provide a rule for determining *whether* arbitration clauses in certain kinds of contracts are enforceable. If an arbitration clause turns out to be invalid, that doesn't mean the FAA didn't apply in the first place. It merely means that the FAA applies, but it does not require the arbitration agreement to be enforced.

Most threshold issues are not about whether the FAA applies. They are about whether, *under the FAA*, an arbitration provision must be enforced. The issue here is different. The issue here is whether the FAA applies *at all*.

The text of the FAA, this Court's case law—and common sense—require that courts must decide whether the FAA applies before they can look to the statute to compel arbitration.

II. THE FAA DOES NOT APPLY TO TRANSPORTATION WORKERS' AGREEMENTS TO PERFORM WORK.

The FAA exempts the "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. When the statute was enacted, all agreements to perform work—including those of independent contractors—were "contracts of employment." By its plain terms, then, the FAA exempts all transportation workers' agreements to perform work—including those of independent contractors. *See Wisconsin Cent.*, 138 S. Ct. at 2074 (statutory text should be given its

"ordinary, contemporary, common meaning at the time Congress enacted the statute" (quotation marks and alteration omitted)).

A. When the FAA was Passed, the Ordinary Meaning of the Phrase "Contracts of Employment" was Agreements to Perform Work.

In 1925, when Congress enacted the FAA, the phrase "contracts of employment" had but one common meaning: agreements to perform work.

1. Dictionaries contemporary with the FAA defined the word "employment" broadly as a synonym for "work." *See, e.g.*, 3 The Century Dictionary and Cyclopedia 1904 (1914) (defining employment as "[w]ork or business of any kind"); Webster's New International Dictionary of the English Language 718 (1st ed. 1909) (listing "work" as synonym for employment); Webster's Collegiate Dictionary 329 (3d ed. 1916) (listing "work" as synonym for employment); *id.* at 1100 (offering as one definition of "work": "employment; occupation"); Black's Law Dictionary 422 (2d ed. 1910) ("Employment. This word does not necessarily import an engagement or rendering services for another. A person may as well be 'employed' about his own business as in the transaction of the same for a principal.").

These definitions did not distinguish between different kinds of work—or the work done by different kinds of workers. *All work*, under the definitions common at the time, was "employment." Thus, a "contract

of employment" was simply an agreement to perform work. *Cf.* Webster's New International Dictionary 488 (defining "contract" as "an agreement . . . to do or forbear something").

Prime does not dispute the accuracy of these definitions. Instead, it chastises the lower court for relying on them. Prime argues that the phrase "contracts of employment" is indivisible—that its meaning cannot be determined by combining the definitions of the words "contract" and "employment." Pet. Br. 23-24. Given its insistence, one would expect the company to cite sources contemporary with the FAA demonstrating that the phrase "contracts of employment" was used differently than its constituent words would suggest. But Prime doesn't even attempt to do so. Presumably that's because—as detailed below—there's overwhelming evidence that when the FAA was enacted, the ordinary meaning of the phrase "contracts of employment" was *precisely* that suggested by combining the definitions of "contracts" and "employment": agreements to perform work. The employment status of the worker was irrelevant.

2. Sources contemporary with the FAA demonstrate that the phrase "contracts of employment" was ordinarily used as a general term for agreements for work—as opposed to, for example, contracts for the sale of real estate or goods. The phrase was *not* ordinarily used to distinguish between different kinds of work agreements. To the contrary, over and over again in the early twentieth century, across a wide range of sources, the phrase "contract of employment" was used

to describe *any* agreement to perform work—including that of an independent contractor.

a. This Court's case law. This Court, for example, repeatedly called independent contractors' work agreements "contracts of employment." In *Watkins v. Sedberry*, for instance, this Court described as a "contract of employment" an attorney's agreement to represent a bankruptcy trustee in a lawsuit "to recover [the bankrupt's] property." 261 U.S. 571, 575 (1923). And in *Owen v. Dudley*, this Court called an agreement by attorneys to represent the Eastern Cherokee tribe in pursuing claims against the United States a "contract of employment." 217 U.S. 488, 494 (1910). Attorneys hired for "a single suit" or a "particular transaction" are not, of course, servants of their clients—they're independent contractors. *Louisville, E. & St. LR Co. v. Wilson*, 138 U.S. 501, 505-06 (1891). And yet this Court consistently characterized their agreements to perform work as "contract[s] of employment." *See, e.g.*, *Calhoun v. Massie*, 253 U.S. 170, 179 (1920) (McReynolds, J., dissenting); *Consaul v. Cummings*, 222 U.S. 262, 272 (1911); *Taylor v. Bemiss*, 110 U.S. 42, 44 (1884); *see also King v. Putnam Inv. Co.*, 248 U.S. 23, 23 (1918) (calling land-owner's contract with a real estate brokerage company to find a purchaser for his land a "contract of employment"); *Putnam Inv. Co. v. King*, 96 Kan. 109 (1915) (describing contract).

b. Other courts' case law. These cases are not outliers. Courts across the country used the phrase "contract of employment" as a general term for *any* agreement to perform work—including that of an

independent contractor. In *Luckie v. Diamond Coal*, for example, the California Court of Appeal used "contract of employment" to describe an agreement very similar to Prime's Operating Agreement: The contract stated that a truck driver—who had leased his truck from his employer—was responsible for gas, oil, repairs, and insurance; and it provided that the driver bore all "responsibility" and liability "for the operation of the truck." 41 Cal. App. 468, 472-73 (1919). Nevertheless, the court repeatedly characterized the contract as a "contract of employment." *Id.* at 475, 477-79, 481-82. And, the court held, whether the driver was a servant of the company or an independent contractor could not be determined "solely from the written contract of employment," because a worker's status depends on the "true relation" between the worker and his employer, not the terms of the contract. *Id.* at 477, 479.

This analysis makes clear that, in ordinary usage, there was a distinction between workers' *status*—which depended on their relationship with their employer—and their *contracts*—which were "contracts of employment" regardless. *See also Teamster as Independent Contractor Under Workmen's Compensation Acts*, 42 A.L.R. 607, 617 (1926) (citing cases from between 1916 and 1925 and calling teamsters' agreements to perform work "contract[s] of employment" regardless of whether the contract suggests a master-servant relationship or an "independent" "employment").

Countless cases from this time period refer to agreements to perform work as "contracts of employment," without regard to the worker's employment

status. *See, e.g.*, *Tankersley v. Webster*, 116 Okla. 208 (1925) (describing the "contract of employment" of "an independent contractor"); *Lindsay v. McCaslin*, 123 Me. 197 (1923) ("When the contract of employment has been reduced to writing, the question whether the person employed was an independent contractor or merely a servant is determined by the court[.]"); *Waldron v. Garland Pocahontas Coal Co.*, 89 W. Va. 426 (1921) ("Whether a person performing work for another is an independent contractor depends upon a consideration of the contract of employment, the nature of the business, the circumstances under which the contract was made and the work was done."); Appendix 1a-12a (citing additional cases).

c. ***Statutes.*** Myriad state and federal statutes contemporary with the FAA also used the term "contract of employment" in this way. For example, a federal appropriations statute prohibited the United States Shipping Board from using the appropriated funds to compensate special counsel "unless the *contract of employment* has been approved by the Attorney General." Act of Aug. 24, 1921, ch. 89, 42 Stat. 192, 192 (emphasis added). These special counsel, whose "contract[s] of employment" had to be approved, included private law firms hired by the Shipping Board to litigate specific cases—in other words, independent contractors. *See* 61 Cong. Rec. 4917, 4925 (1921).

Similarly, a federal statute, passed just a year before the FAA, provided for the payment of attorneys "employed" by the Cherokee Tribe to litigate claims against the United States, and limited the amount of

such payments to those "stipulated in the *contract of employment*." Act of Mar. 19, 1924, ch. 70, § 5, 43 Stat. 27, 28 (emphasis added). Again, these were attorneys hired to prosecute specific claims—i.e. independent contractors. *See, e.g.*, *Indian Appropriation Bill: Hearings Before a Subcomm. of the H. Comm. on Indian Affairs*, 64th Cong. 24-25 (1916) (reprinting contract between principal chief of Cherokee Nation and attorney); *see also* Appendix 12a-13a (citing additional statutes).

State statutes, too, frequently used the term "contract of employment" to refer to agreements with independent contractors. *See, e.g.*, Act of Mar. 10, 1909, ch. 70, § 1, 1909 Kan. Sess. Laws 121, 121 ("contracts of employment of auditors, accountants, engineers, attorneys, counselors and architects for any special purpose"); Act of Feb. 10, 1913, ch. 7, § 2, 1913 N.Y. Sess. Laws 9, 9-10 ("contract[s] of employment" of agents of insurance underwriters, where "agents" was defined to *exclude* "officers and salaried employees"); Appendix 14a-15a (citing additional statutes).

d. Other sources. So too did a wide range of other sources, including agency documents, treatises, scholarly articles, and ordinary newspapers. *See, e.g.*, I.T. 2036, III-1 C.B. 117, 119 (1924) (federal Income Tax Unit ruling calling agreement of attorney held to be an independent contractor a "contract of employment"); *Sam W. Eskridge Sues Frisco for Seventy-Five Thousand Dollars*, The Monett Times, Apr. 6 1917 ("contract of employment" with attorney to prosecute

single claim); Theophilus J. Moll, A Treatise on the Law of Independent Contractors and Employers' Liability 47-48 (1910) ("It has been laid down that the relation of master and servant will not be inferred in a case where it appears that the power of discharge was not an incident of the *contract of employment*." (emphasis added)); Appendix 15a-23a (citing additional sources).

Even *actual work agreements* of independent contractors were labeled—in the text of the contracts themselves—"contract[s] of employment." *See, e.g.*, *Survey of Conditions of the Indians in the United States: Hearings Before a Subcomm. of the S. Comm. on Indian Affairs*, 71st Cong. 13242-43 (1932) (reprinting 1925 contract described in the body of the agreement itself as a "contract of employment," even though contract labeled worker "independent contractor"); *Survey of Conditions of the Indians in the United States: Hearings Before a Subcomm. of the S. Comm. on Indian Affairs*, 70th Cong. 1139-1141 (1929) (reprinting 1926 agreement of attorneys to represent client in litigation involving trust agreement, where agreement was entitled "contract of employment"); *see also Calhoun*, 253 U.S. at 172-73 (reprinting text of contract stating attorney was "employed"); *Owen*, 217 U.S. at 488 (same).

* * *

Thus, at the time the FAA was enacted, the use of the term "contracts of employment" to refer to independent contractors' agreements to perform work was not an exception. It was the rule. The appendix to this

brief lists over one hundred representative sources, contemporary with the passage of the FAA, that demonstrate that the ordinary meaning of the phrase "contracts of employment" encompassed all agreements to perform work—including those of independent contractors. The FAA should be interpreted in accordance with this "ordinary, contemporary, common meaning." *Wisconsin Cent.*, 138 S. Ct. at 2074.

B. Congress Did Not Silently Incorporate into the FAA an Idiosyncratic Definition of "Contracts of Employment" that Differs from Its Ordinary Meaning.

Prime does not—and cannot—dispute that when the FAA was passed, the phrase "contracts of employment" was commonly used as a general term meaning agreements to perform work. Nevertheless, Prime argues that for purposes of the FAA, "contracts of employment" should be given a different meaning: agreements to perform work that, on their face, purport to establish a master-servant relationship under common-law agency principles, regardless of whether such a relationship actually exists. *See* Pet. Br. 8. Even if the phrase "contracts of employment" were "*capable* of bearing" this meaning—which it is not—this definition was certainly not the phrase's "*ordinary* meaning" in 1925, *Wisconsin Cent.*, 138 S. Ct. at 2072. Prime offers no "persuasive proof"—indeed, it offers no proof at all—that "Congress sought to invoke [this] idiosyncratic definition," *id.* at 2073.

1. The Use of the Word "Employee" as a Term of Art is Irrelevant to the Ordinary Meaning of the Phrase "Contracts of Employment."

Prime does not cite a single source contemporary with the FAA that defines—or even uses—the phrase "contracts of employment." Instead, Prime offers a lengthy disquisition on the meaning of the word "employ*ee*." But the FAA exempts "contracts of employ*ment*," not "contracts of employ*ees*." And although "employee" and "employment" obviously have the same root, by 1925, the word "employ*ee*" had multiple common meanings, while the phrase "contracts of employ*ment*" had only one: agreements to perform work.

Originally, *all* words with the root "employ" had a general meaning. "Employ" originally comes from the Latin "implicāre," which, taken literally, meant to "enfold" or, less literally, to "involve." *See* Barnhart Dictionary of Etymology 326 (Robert K. Barnhart, ed. 1988). The less literal meaning became the basis for the French word "emploier," which meant "to involve in or apply to a particular purpose"—to use. John Ayto, Employ, Word Origins (2d ed. 2005). And "emploier" became the basis for the English word "employ." *See id.*; Barnhart Dictionary 326. Thus, to "employ" workers is literally to use them or to apply them to a particular purpose. There is no etymological basis for using the word "employ"—or other words that take "employ" as their root—to distinguish between different kinds of workers.

"Strictly and etymologically," therefore, the word "employee" means simply one who is employed—a worker. *See* Black's Law Dictionary 421 (2d ed. 1910). But, by 1925, "employee" no longer consistently bore this meaning; it had come to be used in a multitude of different ways. Prime seizes on the fact that one of the ways in which "employee" was used was as a term of art denoting a common-law master-servant relationship. Pet. Br. 20-21. But this was not the word's only usage. When the FAA was passed—and even long after—"employee" was still often used as a synonym for the word "worker." *See, e.g.*, *Prince v. Schwartz*, 180 N.Y.S. 703, 704 (App. Div. 1920) ("[I]t must be held that the employé was an independent contractor."); Black's Law Dictionary 951 (3d ed. 1933) ("If the employee is merely subject to the control or direction of the employer as to the result to be obtained, he is an independent contractor."). Of particular relevance here, in dispute resolution statutes governing the railroad industry at the time, "employee" was used to mean *any* railroad worker—not just common-law servants. *See infra* page 41.

The word "employee"—with its multiplicity of meanings—was an outlier amongst "employ"-rooted words: Although "employee" was, in some areas of the law, commonly used as a term of art to mean common-law servant, other forms of the word "employ" were not ordinarily used that way. *See, e.g.*, 2 The Century Dictionary 1232 (1914) (defining independent contractor "as distinguished from servant or employee, a person following a regular independent *employment*, who

offers his services to the public to accept orders and execute commissions for all who may *employ* him" (emphasis added)); *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 30 (1922) ("[T]he party employed was an independent contractor."); *Arthur v. Tex. & P. Ry. Co.*, 204 U.S. 505, 516-17 (1907) (referring to "an independent contractor" as "employed").[5]

Indeed, independent contractors were often *defined* as workers "exercising an independent employment." *See, e.g.*, 2 Bouvier's Law Dictionary and Concise Encyclopedia 1533 (8th ed. 1914); 2 The Century Dictionary 1232; *General Discussion of the Nature of the Relationship of Employer and Independent Contractor*, 19 A.L.R. 226, 227-32, 243 (1922) (citing numerous cases).[6]

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[5] In arguing otherwise, *Amicus* The Cato Institute misreads this Court's decision in *Robinson v. Baltimore & Ohio R.R. Co.*, 237 U.S. 84 (1915). Cato Br. 5-6. There, this Court held that—in the Federal Employers' Liability Act—"Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee." *Id.* at 94. But the question in *Robinson* was not whether the worker was an independent contractor or a servant. It was whether he was the "employee" of the defendant railroad, even though he actually worked for a different company. *Id.* at 92. The "natural sense" to which the case refers, therefore, is that workers are "employed" by the company for which they actually work. *See id.* at 94.

[6] *Bouvier's Law Dictionary* is the only source Prime cites for its contention that "at the time the FAA was enacted, it was well established . . . that an independent contractor agreement did not establish employment." Pet. Br. 17 (emphasis omitted). But *Bouvier's*, like so many sources at the time, defined "independent contractor" as "[o]ne who, exercising an independent *employment*,

It is unsurprising, therefore, that independent contractors' agreements to perform work were called "contracts of employment." *See supra* Part II.A.

On the rare occasion when someone even attempted to argue that the word "employee"—when used as a term of art to mean common-law servant—shared the same meaning as other "employ"-rooted words, the argument was soundly rejected. For example, an architect who worked for a Minnesota state agency as an independent contractor tried to convince the U.S. Board of Tax Appeals that he didn't have to pay taxes under the Revenue Act of 1926, which exempted state "officer[s] or employee[s]"—an exemption the Board held did not apply to independent contractors. *Johnston v. C.I.R.*, 14 B.T.A. 605, 607 (1928) (quotation marks omitted). The Minnesota statute authorizing the architect's work provided that the state agency "shall employ an architect," and so, the architect argued, he must be an "employee." *Id.* at 608 (quotation marks omitted). If Prime were correct—and all words with the root "employ" referred only to common-law servants—the architect should have won.

But the Board of Tax Appeals rejected his argument. Referring to the architect's contract with the state as a "contract of employment," the Board held

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contracts to do a piece of work according to his own methods[.]" 2 Bouvier's Law Dictionary 1533 (emphasis added). In quoting this definition, Prime misleadingly omits the key words "exercising an independent employment." *See* Pet. Br. 17. The full definition makes clear that the dictionary says precisely the opposite of what Prime says it does: that the work of independent contractors *was* "employment."

that a person "employed" under such a contract could be *either* an independent contractor *or* an "officer or employee." *Id.* at 606-09. "To employ," the Board explained, is a general term, meaning "'to make use of the services of; to have or keep at work; to give employment to; [or] to intrust with some duty or behest.'" *Id.* at 608 (quoting Webster's New International Dictionary). Any worker could be "employed." *See id.* But the word "employee" was a term of art. *See id.* Therefore, the Board held, a worker who was "employed" under a "contract of employment" was not necessarily an "employee." *See id.* at 606-09.

A statutory phrase is interpreted according to the ordinary meaning of the *actual* words it uses, not the meaning, of other, similar-sounding words it doesn't use—even if those similar-sounding words share the same root. *See FCC v. AT & T Inc.*, 562 U.S. 397, 403 (2011) (rejecting argument that the word "personal" should be interpreted in accordance with the legal definition of the word "person" rather than its ordinary meaning, because two words from the same root "may have meanings as disparate as any two unrelated words"). The phrase "contracts of employ*ment*" should be interpreted in accordance with its ordinary meaning in 1925—not the meaning of the word employ*ee*.

In its entire brief, Prime cites only a single source that even mentions the actual statutory phrase at issue, "contracts of employ*ment*." That source is the *2014* edition of *Black's Law Dictionary*—published nearly a century after the FAA was passed. *See* Pet. Br. 17. That dictionary cannot possibly shed light on the ordinary

meaning of the phrase "contract of employment" in 1925. *See Wisconsin Cent.*, 138 S. Ct. at 2074 ("[E]very statute's meaning is fixed at the time of enactment." (emphasis omitted)).[7]

Relying on sources contemporary with the FAA is particularly important here because the usage patterns of the phrase "contract of employment" have shifted over time. Unlike in 1925, "contract of employment" is today sometimes used to refer exclusively to common-law servants' agreements to perform work. *See, e.g.*, Pet. Br. 17. But even now, the more general usage of the term to refer to *any* work agreement remains common. *See, e.g.*, *Lucky Capital Mgmt., LLC v. Miller & Martin, PLLC*, No. 16-16161, 2018 WL 3239281, at *4 (11th Cir. July 3, 2018) ("contract of employment" between attorney and client); *Ward v. DirecTV LLC*, 342 Ga. App. 69, 71 (2017) ("contract of employment" labeling worker independent contractor); *Griffin v. Compass Grp. USA, Inc.*, No. 3:16-CV-917-JAG, 2017 WL 2829619, at *2 n.2 (E.D. Va. June 30, 2017) (quoting Virginia statute referring to independent contractor's "contract of employment"); *see also* Prime Inc., https://www.primeinc.com/ (last visited July 12, 2018) (Prime's own website calling its

[7] Prime contends that because *Black's* states that the term "employment contract" was first used in 1927, it must have had the same definition back then as it does now. Pet. Br. 17. It didn't. Like the phrase "contracts of employment," the phrase "employment contract" was used to refer to any work agreement—including that of an independent contractor. *See, e.g.*, *Kelly v. Hanson*, 109 Okla. 248 (1925) (describing independent contractor's agreement as an "employment contract").

application for "driving position[s]" an "application for *employment*," though Prime's driver positions include those it contends are independent contractors (emphasis added)).

And in 1925—the only point in time that matters for purposes of this case—that was its *only* common meaning. *See supra* Part II.A.

2. There is No Canon of Statutory Construction that Justifies Ignoring the Ordinary Meaning of the Text.

Unable to rely on the ordinary meaning of the statute, Prime asks this Court to rewrite it. In doing so, the company purports to rely on the canons of statutory interpretation. But there is no canon of statutory interpretation that permits courts to rewrite the law.

a. First, Prime argues that although the FAA exempts the "contracts of employment of . . . *any* other class of *workers* engaged in" commerce, it should be interpreted to exempt only common-law servants. Pet. Br. 26-27. Prime doesn't even attempt to argue that its interpretation has any basis in the actual words Congress used. After all, the statute does not exempt any "class of servants" or even any "class of employees." It exempts any "class of *workers*"—language that, by its terms, does not distinguish between different kinds of workers. *Cf.* Webster's New International Dictionary 2350 (defining worker broadly as "[o]ne that works").

Contrary to Prime's contention, the company's countertextual interpretation cannot be justified by the canon of statutory interpretation *ejusdem generis*. That canon holds that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City*, 532 U.S. at 114-15 (alterations omitted). The "specific words" that precede the general phrase "any other class of workers" are "seamen" and "railroad employees." The link between these categories of workers is not employment status. As this Court held in *Circuit City*, the link between these workers is that they are transportation workers. 532 U.S. at 121 ("Congress' demonstrated concern with transportation workers and their necessary role in the free flow of goods explains the linkage[.]").

Indeed, the statute itself says so. The text of the FAA specifies that the link between "seamen, railroad employees" and the other "workers" whose employment contracts are exempt from the Act is that they are all "engaged in foreign or interstate commerce"—not that they are all common-law servants. *See* 9 U.S.C. § 1; *cf. Paroline v. United States*, 134 S. Ct. 1710, 1720-21 (2014) (holding that catchall phrase at end of enumerated list "is most naturally understood as a summary of the type of [objects] covered" by the statute).

Ejusdem generis is a tool to ensure that "a general word will not render specific words meaningless." *See CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277,

295 (2011). There is no danger of that happening here. This Court has already limited the "class of workers" exempt from the FAA to workers like seamen and railroad employees—transportation workers. *Circuit City*, 532 U.S. at 121. Prime cannot justify rewriting the statute to solve a problem this Court has already solved. *See CSX*, 562 U.S. at 295 (declining to apply *ejusdem generis* when there was no concern about rendering specific words meaningless).

Moreover, even without this Court's decision in *Circuit City*, Prime's argument would not withstand scrutiny, for "seamen" and "railroad employees" were *not* all common-law servants.

Seamen were defined functionally—by their work aboard a vessel—not their employment status. *See, e.g.*, *The Buena Ventura*, 243 F. 797, 799 (S.D.N.Y. 1916) (seamen are all those who "contribute to and labor about the operation and welfare of the ship when she is upon a voyage"). A ship's surgeon, for example, was an independent contractor—"not the ship owner's servant." *Allan v. State S.S. Co.*, 132 N.Y. 91, 99-100 (1892). But surgeons on board vessels were still "seamen." *See, e.g.*, *The Sea Lark*, 14 F.2d 201, 201 (W.D. Wash. 1926); *The Buena Ventura*, 243 F. at 799; *Holt v. Cummings*, 102 Pa. 212, 215 (1883). Pilots—skilled sailors who came aboard ships to navigate them through difficult waters or into or out of ports—were also "seamen." *See, e.g.*, *Pac. Mail S.S. Co. v. Joliffe*, 69 U.S. 450, 456 (1864) ("The object of the" statute regulating pilots in the port of San Francisco "was to create a body of hardy and skilful seamen."); *United States v.*

Thompson, 28 F. Cas. 102, 102 (C.C.D. Mass. 1832) (Story, J.) ("[A] pilot, a surgeon, a ship-carpenter, and a boatswain, are deemed seamen, entitled to sue in the admiralty."). But they, too, were not necessarily common-law servants. *See Homer Ramsdell Transp. Co. v. La Compagnie Generale Transatlantique*, 182 U.S. 406, 413-14 (1901).

Similarly, "railroad employees," at least in the context of dispute resolution statutes, were defined functionally by their work on the railroad, not their employment status. In the years leading up to the FAA, Congress had repeatedly passed dispute resolution statutes governing railroad "employees." But in all of these statutes—including the Transportation Act, which was in effect when the FAA was passed—the term railroad "employees" was defined to mean *all* those whose work contributed to the operation of the railroads, *including* independent contractors. *See Indiana Harbor*, 3 R.L.B. at 337 (rejecting contention that "railroad employees" were limited to servants of the railroad and holding "[w]hen Congress in [the Transportation Act] speaks of railroad employees, it undoubtedly contemplates those engaged in the customary work directly contributory to the operation of the railroads"); Erdman Act, 30 Stat. at 424 (defining "employees" as all workers "actually engaged in any capacity in train operation or train service of any description"); Newlands Act, 38 Stat. at 104 (same).

Thus, like "seamen," "railroad employees" were not limited to common-law servants. In arguing otherwise, Prime and its amici rely on the Federal Employers'

Liability Act (FELA) and other workmen's compensation statutes that used the word "employee" as a term of art to mean common-law servant. But as the Railroad Labor Board explained at the time, the phrase "railroad employees" meant something different in dispute resolution statutes than it did in statutes like FELA. *Indiana Harbor*, 3 R.L.B. at 337-38. Statutes like FELA govern "the *private* relations between the employer and the employee." *Id.* at 338-39 (emphasis added). The point of these statutes was (and is) to compensate workers injured in their employers' "service." *Id.* If an employer lacks control over the manner in which a worker performs their job, it makes sense that the employer might not be required to compensate that worker if they are injured doing it.

In contrast, the "paramount purpose" of dispute resolution statutes was "to [e]nsure to the *public* . . . efficient and uninterrupted railway transportation," *id.* at 339 (emphasis added). And, for that purpose, the Board explained, the worker's technical employment status was "immaterial." *Id.* "[T]he loss and suffering incident to the interruption to traffic growing out of controversies" between railroad companies and their workers is not diminished simply because the workers are not servants of the railroad. *See id.*

Thus, *none* of the categories of workers whose "contracts of employment" are exempt from the FAA are limited to common-law servants. This Court should not rewrite the statute to hold otherwise. *Cf. Cleveland v. United States*, 329 U.S. 14, 18 (1946) ("[W]e could not give the words a faithful interpretation if we confined

them more narrowly than the class of which they are a part.").

b. But even if this Court agreed to redefine the word "workers" to mean common-law servants, that would not be enough to arrive at Prime's proposed reading of the law. Prime does not ask this Court to hold that the transportation-worker exemption applies to the agreements to perform work of common-law servants engaged in commerce. It asks this Court to hold that the exemption applies to agreements to perform work that on their face *describe* a master-servant relationship, *regardless* of whether the worker is, in fact, a common-law servant engaged in commerce. And so to arrive at that interpretation, it is not enough to redefine the word "workers." The phrase "contracts of employment" itself must be redefined. But Prime offers no legitimate justification for doing so.

As an initial matter, the phrase "contracts of employment" is *not* a general term following a list of more specific terms—and so *ejusdem generis* does not apply. *See CSX*, 562 U.S. at 294-95. Nevertheless, Prime attempts to import its flawed *ejusdem generis* analysis of "any other class of workers" into the phrase "contracts of employment." Having misread the transportation-worker exemption to apply only to common-law servants, the company then argues that the phrase "contracts of employment" should be *defined* to mean only those contracts a common-law servant would have signed—which Prime asserts includes only those contracts that, on their face, describe a master-servant relationship. *See* Pet. Br. 27. This argument fails both as

a factual matter and as a matter of statutory interpretation.

As a factual matter, it's simply not true that common-law servants would never sign an agreement labeling them an independent contractor. To the contrary, in 1925, as now, there were (and are) workers classified as independent contractors, who were, in fact, servants. *See, e.g.*, *Nelson v. Am. Cement Plaster Co.*, 84 Kan. 797 (1911); Jennifer Pinsof, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 Mich. Telecomm. & Tech. L. Rev. 341, 349 (2016) (noting misclassification is "especially prevalent" in the trucking industry). And so even if "contracts of employment" is redefined to mean only contracts a common-law servant would sign, that category would still include contracts that misclassify workers as independent contractors.

And as a matter of statutory interpretation, Prime's argument that the *definition* of the phrase "contracts of employment" should change based on the kinds of workers whose employment contracts are exempt from the statute is contrary to the way English ordinarily works. "Contracts of employment of seamen, railroad employees, or any other class of workers engaged in" commerce is another way of writing "contracts of employment" *belonging to* these enumerated workers. *See* Webster's New International Dictionary 1492 (defining "of" as "[i]ndicating the relationship of possession . . . belonging or pertaining to"). Nouns do not change meaning based on the people to whom they belong.

Imagine, for example, that instead of "contracts of employment," there was a statute that exempted "the *pets* of seamen, railroad employees, or any other class of workers"—or their "real estate contracts." Nobody would argue that because the exemption only applies to transportation workers, the *definition* of the word "pet" or the term "real estate contract" changes. "Pet" would still mean domestic animal kept for companionship, and "real estate contract" would still mean property agreement. It's just that the statute would only exempt those domestic animals or those property agreements *belonging to* transportation workers.

So too here. Regardless of *whose* "contracts of employment" are exempt from the statute, the *definition* of "contracts of employment" remains the same: agreements to perform work.

c. Prime attempts to salvage its counterintuitive reading of the statute by arguing that the canon against surplusage somehow requires that the applicability of the transportation-worker exemption be determined solely by the terms of the contract. Pet. Br. 30-31. As explained below, that argument is meritless. And—if "contracts of employment" is given its ordinary meaning—the argument is also irrelevant.

If "contracts of employment" is defined to mean agreements to perform work—in accordance with the phrase's common meaning at the time the statute was enacted—it's unlikely ever to matter whether courts must look solely to the terms of the agreement or whether they may consider facts beyond the four

corners of the contract. It's difficult to imagine a situation—especially in the transportation industry—in which one party, in fact, performs work for the other, but the contract does not purport to describe a work arrangement, and instead describes, say, the sale of real estate or the purchase of goods.

Only if this Court were to reject the ordinary meaning of "contracts of employment"—and adopt Prime's contention that for purposes of the FAA the phrase should be redefined to mean contracts of common-law servitude—would the Court have to decide whether the FAA exempts agreements to perform work that is, *in fact*, common-law servitude, or agreements to perform work that *describe* common-law servitude, regardless of the actual employment relationship. Prime, of course, argues for the latter.

This would be a radical interpretation of the statute. No other federal law—including those that apply only to common-law servants—permits the description of the employment relationship in the contract to control whether the statute applies. *See* Miriam A. Cherry, *The Sharing Economy and the Edges of Contract Law: Comparing U.S. and U.K. Approaches*, 85 Geo. Wash. L. Rev. 1804, 1815 (2017) ("U.S. law does not depend simply on the label assigned by the parties[.]"); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992) (under common law, "all of the incidents of the relationship must be assessed"). And with good reason. Doing

so would allow employers to override Congress' intent by illegally misclassifying their workers.[8]

There is nothing in the FAA that suggests they should be able to do so. Prime emphasizes that the object of the transportation-worker exemption is "contracts of employment." Pet. Br. 30. But that doesn't say anything about what the phrase "contracts of employment" *means*. Indeed, this Court rejected a near-identical argument in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995). The respondents in that case argued that because § 2 of the FAA applies to "contract[s] evidencing a transaction involving commerce," courts determining whether that Section applies must look to the contract itself (or the parties' intentions thereunder)—not to whether the resulting transaction, in fact, involved commerce. *See id.* at 278. This Court disagreed, holding that "the transaction (that the contract 'evidences') must turn out, *in fact*, to have involved interstate commerce." *Id.* at 277, 281. "[T]he validity of an arbitration clause," the Court explained, should not turn "on what, from the perspective of the statute's basic purpose, seems happenstance,

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[8] This is not a new concept. Courts at the time the FAA was passed also refused to credit contractual terms that diverged from the "actual relation" between the parties. *See, e.g.*, *Nelson*, 84 Kan. 797; *McKenna v. Snare & Triest Co.*, 147 A.D. 855, 869 (N.Y. App. Div. 1911).

namely, whether the parties happened to think to insert a reference to interstate commerce in the document." *Id.* at 278.

So too here. It would defy logic to conclude that the FAA's applicability turns on the "happenstance" of "whether the parties happened to think to"—or, more likely, whether an employer thought it was in its best interest to—describe in the contract itself factors that would suggest a master-servant relationship. *See id.* at 278-79.

Perplexingly, Prime's argument to the contrary relies on *Allied-Bruce*. Prime contends that it is the phrase "evidencing a transaction" in § 2 of the FAA "that authorize[d]" the Court in *Allied-Bruce* "to look beyond the four corners of the contract." Pet. Br. 30. In Prime's view, because the transportation-worker exemption does not contain this phrase, its applicability must hinge solely on the terms of the contract. Otherwise, Prime argues, the "evidencing a transaction" language in § 2 would be superfluous.

Allied-Bruce itself refutes this reasoning. This Court concluded § 2 requires courts to look beyond the contract not *because* of the "evidencing" language but *despite* it. *See Allied-Bruce*, 513 U.S. at 279. The Court "concede[d]" that its interpretation meant that the "evidencing" language does "little work." *Id.* And, indeed, this Court has repeatedly used the phrase "contracts involving commerce" and "contracts evidencing a

transaction involving commerce" interchangeably in describing the scope of § 2. *See, e.g.*, *Vaden*, 556 U.S. at 58; *Hall St.*, 552 U.S. at 590.

Thus, there is no grand significance to § 2's use of the phrase "evidencing a transaction." Nor, therefore, can there be any grand significance to § 1's omission of that phrase. Presumably, the reason the transportation-worker exemption does not contain the phrase "evidencing a transaction" is because including that phrase would render the exemption nonsensical. "Contracts of employment" is—and was in 1925—a common English phrase. "Contracts evidencing a transaction of employment" is—and was—not.[9]

In addition to being unsupported by the text, Prime's interpretation would also lead to absurd results. If, as Prime argues, the "applicability of the § 1 exemption" truly must be determined "*only*" from the terms of the contract, the contract itself would have to describe not just employment but engagement in commerce for the exemption to apply. Pet. Br. 33 (emphasis added and quotation marks omitted). After all, there's no dispute that the exemption applies only to the contracts of "workers engaged in commerce."

But many employment contracts do not specify whether the worker is engaged in commerce. Here, for example, although Oliveira is a long-haul trucker, his contract does not specify that he crossed state lines.

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[9] Neither Westlaw nor Google produces any search results for the phrase "contract evidencing a transaction of employment."

Worse, Prime's interpretation would enable parties to evade the transportation-worker exemption's limits entirely. If, for some reason, an employer wanted to exclude a retail worker from the FAA, all it would have to do is label that worker a "seaman" in the contract. And courts could look no further. Conversely, if a railroad wanted to avoid the exemption, it could just call its workers hairdressers in their employment contracts. And, again, the court would have to accept that characterization.

This is precisely the haphazard application of the FAA that *Allied-Bruce* warned against. Nothing in the statute—or in the canons of statutory interpretation—requires this absurd result.

C. The Purpose and Statutory Context of the Transportation-Worker Exemption Confirm that It Should Be Given Its Ordinary Meaning.

As this Court explained in *Circuit City*, it is "reasonable to assume that Congress excluded 'seamen' and 'railroad employees' " from the FAA "for the simple reason that it did not wish to unsettle" the pre-existing dispute resolution schemes governing these workers. *Circuit City*, 532 U.S. at 121. And Congress excluded "any other class of workers engaged in" commerce because it was concerned not just with seamen and railroad employees, but with *all* "transportation workers and their necessary role in the free flow of goods." *Id.* By the time the FAA was enacted, there had been a long history of violent, disruptive strikes in the

transportation industry. *See supra* pages 3-4. It would be "rational," therefore, "for Congress to ensure that workers in general would be covered by the provisions of the FAA, while reserving for itself more specific legislation for those engaged in transportation." *Circuit City*, 532 U.S. at 121.

The ordinary meaning interpretation of the FAA—as exempting all transportation workers' agreements to perform work—satisfies these twin purposes: ensuring that the Act does not conflict with other dispute resolution statutes in effect at the time and reserving for Congress the ability to specifically regulate transportation workers' disputes. Prime's interpretation, on the other hand, undermines these goals.

1. Contrary to Prime's contention, the dispute resolution statutes in effect in the maritime and railroad industries when the FAA was passed applied to all workers in the regulated industries—not just common-law servants.

In the maritime industry, the Shipping Commissioners Act authorized government-appointed commissioners to resolve disputes between a "master, consignee, agent, or owner" of a ship "and *any* of his crew"—not just those whose contracts happened to describe a master-servant relationship. § 25, 17 Stat. at 267 (emphasis added); *see The Bound Brook*, 146 F. 160, 164 (D. Mass. 1906) (defining "crew" as those who work aboard a vessel "without reference to the nature of the arrangement under which they are on board").

Similarly in the railroad industry, the Transportation Act established a Railroad Labor Board to hear disputes between railroads and their "employees" or "subordinate officials." Transportation Act § 307. The "employees" to whom the Act applied were not limited to common-law servants, but instead were defined as *all* workers "engaged in the customary work directly contributory to the operation of the railroads." *Indiana Harbor*, 3 R.L.B. at 337. As the Railroad Labor Board explained, it would be "absurd" for common-law servants to be prohibited from disrupting commerce, while contractors could "engage in industrial warfare ad libitum." *Id.*

And, in fact, the Act was repeatedly applied to workers who were *not* common-law servants of the railroad. *See, e.g.*, *id.*; *American Federation of R.R. Workers v. Erie R.R. Co.*, Decision No. 1962, 4 R.L.B. 615, 616 (1923); *St. Louis-San Francisco Ry. Co.*, 3 R.L.B. at 702 (applying Transportation Act to independent contractors).

Thus, it would make no sense for the transportation-worker exemption to be limited to common-law servants—such a limitation would create precisely the conflict between the FAA and pre-existing dispute resolution statutes that Congress was trying to avoid.

In arguing to the contrary, Prime relies heavily on the Railway Labor Act—a statute passed more than a year *after* the FAA. *See* Railway Labor Act, ch. 347, 44 Stat. 577 (1926). This Act applied to "every person in the service of a [railroad] carrier (subject to its

continuing authority to supervise and direct the manner of rendition of his service)"—a narrower set of workers than those governed by either the Transportation Act or the Shipping Commissioners Act. *Id.* § 1. Prime argues that the FAA should be interpreted to exempt only the kind of workers subject to the Railway Labor Act (which, Prime contends, are only common-law servants). Pet. Br. 25.

But that too makes no sense. Congress' goal was to avoid disrupting "developing" *and "established"* dispute resolution schemes. *Circuit City*, 532 U.S. at 121 (emphasis added). If it had limited the transportation-worker exemption to just those workers covered by the Railway Labor Act—a law that didn't even exist yet—it would have disrupted the *existing* dispute resolution schemes, which covered all workers in the relevant industries.

Moreover, on Prime's interpretation, the FAA wouldn't even exempt all of the workers subject to the Railway Labor Act. That Act defines the workers to whom it applies based on their *actual* relationship with the railroad. *See* Railway Labor Act § 1. But Prime argues that the FAA only exempts workers whose contracts *say* they are common-law servants—regardless of their *actual* relationship with their employer. Thus, even on Prime's own account, its interpretation of the FAA would bring the statute into conflict with the Railway Labor Act—as well as every dispute resolution statute governing the transportation industry when the FAA was passed, none of which defined

their scope by what a worker's employment contract said.

The exemption's ordinary meaning, on the other hand, poses no such problem.

2. Prime's interpretation also undermines Congress' more general goal in exempting transportation workers' employment contracts from the FAA: to reserve for itself the ability to regulate the disputes of workers integral to the "free flow of goods." Conductors or sailors or truck drivers are just as "necessary" to "the free flow of goods"—and just as able to interrupt that "free flow of goods" by striking—if they are (or their contracts say they are) independent contractors as they are if their contracts say they are common-law servants. Congress was concerned with workers vital to commerce, not workers vital to commerce whose contracts also happened to evidence on their face sufficient indicia of a common law master-servant relationship.

D. Prime's Meritless Policy Concerns Cannot Override the Statute's Plain Meaning.

Unable to ground its interpretation in the text or purpose of the FAA, Prime resorts to arguing that the plain-text reading of the statute is bad policy. *See* Pet. Br. 28-29, 31-32. But "[p]olicy arguments are properly addressed to Congress, not this Court." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018). And, in any event, Prime's policy concerns are meritless—in fact,

worse than meritless. Prime's countertextual interpretation actually *causes* difficult problems that are avoided by adhering to the plain meaning of the statute.

1. It is Prime's interpretation of the statute—not its ordinary meaning—that "would create countless complexities every time a putative employer moves to compel arbitration," Pet. Br. 32. Prime argues that to determine whether an agreement is a "contract of employment" exempt from the FAA, courts must apply the same factors they ordinarily use to determine whether a worker is a common-law servant—but to the contract itself rather than the actual employment relationship. Pet. Br. 29, 33. This would often be a difficult—if not impossible—task.

Take Prime's contract with Oliveira, for example. Many aspects of the contract are indicative of a master-servant relationship: Prime reserved the right to fire Oliveira without cause, J.A. 79. *See* Rev. Rul. 87-41, 1987-1 C.B. 296 (1987) ("An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions."). The contract shows Oliveira's work was part of Prime's "regular business," not a "distinct occupation," *Darden*, 503 U.S. at 324. *See* J.A. 64 (identifying Prime as a motor carrier and indicating that Oliveira agreed to haul freight). And Oliveira's contracts evidence a continuing relationship with Prime—not just one-off employment for a single delivery, J.A. 64. *See Darden*, 503 U.S. at 323 (listing "duration of the relationship between the parties" as a relevant factor).

The meaning of other aspects of Oliveira's contract, however, is disputed. For example, Prime argues that the Operating Agreement shows Oliveira provided the instrumentalities of his work. Pet. Br. 34. But, in fact, the Agreement sheds doubt on this assertion. Oliveira's contract shows that he leased his tractor from a Prime affiliate and that he was required to lease it right back to Prime—and Prime had control over it the whole time. J.A. 64, 76. Moreover, the contract states that Prime provided the trailers—the containers in which goods are hauled—an integral tool, without which Oliveira could not do his job. J.A. 66-67. So, was Prime the "source of the instrumentalities and tools" of Oliveira's work or was Oliveira? Based on the terms of the Operating Agreement, it appears to be Prime. But it's not indisputable. And how should this factor balance with all the others? Prime offers no answer.

Applying the common-law servant inquiry to an employment contract is likely to be at least as uncertain and difficult as applying the inquiry in the way it was intended—to the actual employment relationship. Litigating this issue as part of the determination as to whether the FAA applies, as Prime suggests, would be costly and time-consuming. And different judges could easily come to different conclusions evaluating the same contract.

In some cases, the inquiry Prime claims is required by the FAA wouldn't just be difficult; it would be impossible. Many contracts do not list all—or, sometimes, any—of the factors relevant to employment

status in the contract itself. *See* Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 Berkeley J. Emp. & Lab. L. 295, 341 (2001) ("Most employees lack written contracts that would show clearly that they are subject to an employer's control as there is little, if any, incentive for an employer to make a written agreement that confirms a worker's employee status."). Prime offers no explanation for how a court, in that instance, should determine whether the FAA applies.

Moreover, Prime's interpretation threatens to enmesh courts in the merits of an employment dispute just so they can decide whether to compel arbitration. The terms of an employment contract are not dispositive in determining a worker's employment status, but they are often relevant. *See, e.g.*, *Weary v. Cochran*, 377 F.3d 522, 525 (6th Cir. 2004). So, on Prime's view, courts must conduct part of the inquiry on the merits just to decide whether to compel arbitration.

Applying the ordinary meaning of the statute, on the other hand, would require only that courts determine whether the contract is an agreement to perform work—a question that is unlikely to be contested at all, let alone prove relevant to the merits of a dispute.

2. Prime's interpretation would also permit employers who illegally misclassify their workers as independent contractors to circumvent the transportation-worker exemption if they so choose, while transportation companies that obey the law are unable to do

so. Prime offers no reason why Congress would want to disadvantage law-abiding companies in this way.

3. Prime makes the astounding claim—entirely unsupported by any evidence—that simply enforcing the transportation-worker exemption in accordance with its terms will "have profound, deleterious consequences for both the trucking industry and the wider economy." Pet. Br. 28. This claim is meritless.

For one thing, the exemption is narrow. It applies only to arbitration clauses in transportation worker's employment contracts—it doesn't apply to other kinds of contracts or other kinds of workers. And, even then, it doesn't bar a single arbitration clause. The exemption merely means that state law—rather than federal—applies to their enforcement. *See* Edward J. Brunet, et al., Arbitration Law in America: A Critical Assessment 56 (2006) ("Every state has enacted a comprehensive arbitration law."); *Diaz v. Michigan Logistics Inc.*, 167 F. Supp. 3d 375, 380-81 (E.D.N.Y. 2016) (holding FAA's transportation-worker exemption was irrelevant because the plaintiffs' claims were "subject to mandatory arbitration under New York arbitration law").[10]

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[10] In fact, in proceedings that are currently stayed before the district court, Prime is seeking to compel arbitration of the class claims *in this case* under Missouri law. *See* Prime's Mot. to Deny Certification of Class/Collective Action at 8-9, *Oliveira v. New Prime, Inc.*, Civ. No. 15-10603 (D. Mass. Jan. 23, 2018), ECF No. 118.

Prime's sky-is-falling rhetoric is also belied by the fact that the trucking industry existed long before arbitration clauses in employment contracts became widespread, yet Prime points to no evidence—none—that the industry was unduly burdened (or, indeed, burdened at all) without them.[11] Nor does it point to any evidence that the industry has done any better because arbitration has become more prevalent. Thus, Prime's contention that enforcing the FAA's narrow exemption for transportation workers' employment agreements would somehow devastate the industry and "the wider economy" has no basis in reality.

4. Equally meritless is Prime's reliance on general platitudes about the federal policy favoring arbitration. The policy in favor of arbitration was established by the FAA—it therefore applies only where the FAA applies. Thus, "to rest this case on the general policy of treating arbitration agreements as enforceable as such would be to beg the question, which is whether the FAA has textual features at odds with" applying the law in this case. *See Hall St.*, 552 U.S. at 586. All of the textual features of the FAA are at odds with applying the law in this case: The statute explicitly states that it does not apply.

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[11] The trucking industry was substantially deregulated in 1980. *See* Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793. But the empirical literature on arbitration suggests that arbitration provisions in employment contracts were relatively uncommon until the early 2000s. *See, e.g.*, Mark D. Gough, *The High Costs of an Inexpensive Forum*, 35 Berkeley J. Emp. & Lab. L. 91, 95-96 (2014).

As this Court has recently reiterated, it would be "quite mistaken to assume . . . that whatever might appear to further the statute's primary objective must be the law"—regardless of what the actual text of the statute says. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (alterations and quotation marks omitted). "Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known pursues its stated purpose at all costs." *Id.* (alterations and quotation marks omitted).

This principle is particularly important in construing statutory exemptions, for "exemptions are as much a part" of the statute as the statute's affirmative commands. *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018); *see Henson*, 137 S. Ct. at 1725. The text of the transportation-worker exemption cannot be disregarded simply because doing so might better suit the FAA's overall goals. The whole point of the exemption is to *exclude* transportation workers' employment contracts from those goals.

This Court's decision in *Circuit City* does not hold otherwise. *Circuit City* held that courts interpreting the exemption should not go "*beyond* the meaning of the words Congress used." 532 U.S. at 119 (emphasis added). It did not hold that they should ignore that meaning entirely. Courts must "presume . . . that the legislature says what it means and means what it says." *Henson*, 137 S. Ct. at 1725 (quotation marks and alterations omitted).

Here, Congress said that transportation workers' agreements to perform work are exempt. This Court should "presume" it meant what it said. *Id.*

III. THE OPERATING AGREEMENT IS A TRANSPORTATION WORKER'S CONTRACT OF EMPLOYMENT EXEMPT FROM THE FAA.

There's no dispute that Oliveira is a transportation worker engaged in interstate commerce. J.A. 160 n.9. Nor could there be any dispute that the Operating Agreement is an agreement to perform work. It is, therefore, a transportation worker's "contract of employment" exempt from the FAA.

Prime asserts, in passing, that the Operating Agreement is not between Oliveira and Prime, but rather between Prime and Hallmark Trucking—a company Prime set up for Oliveira. Pet. Br. 33; *id.* at 4 (asserting that though Oliveira signed the contract, he signed it on behalf of Hallmark). But throughout this litigation, Prime has "treated the contract as one between Prime and Oliveira." J.A. 156 n.4; *see* J.A. 171 n.15 (quoting Prime briefing stating that "*Oliveira* entered into an" agreement with Prime). It continues to do so before this Court. *See, e.g.*, Pet. Br. 34 (discussing the rights and responsibilities the contract "provides *respondent*"—i.e., Oliveira, not Hallmark (emphasis added)). Prime cannot now argue otherwise. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

And, in any event, these technicalities are irrelevant here. Regardless of who is technically party to the

Operating Agreement, the Agreement is indisputably an agreement to perform work, and therefore a "contract of employment." And Prime has long conceded that if its Operating Agreement is a "contract of employment" at all, it is a contract of employment of a transportation worker exempt from the FAA. *See* J.A. 160, 172.

Nor could it argue otherwise. Technicalities aside, the Agreement is obviously a contract for Oliveira *himself* to perform work. There are numerous contractual provisions that could not possibly apply to a company—they could only apply to a driver himself. *See, e.g.*, J.A. 67 (referring to "the next driver following You," making clear that "You" is a driver, not a company); J.A. 70 ("You shall (i) drive the Equipment Yourself[.]"); J.A. 72 (providing requirements for the purchase of insurance "against injuries sustained while in pursuit of Your business, for Yourself").

The Operating Agreement is an agreement of a long-haul truck driver to haul freight for a trucking company—a quintessential transportation worker's agreement to perform work. It is, therefore, exempt from the FAA.

CONCLUSION

The judgment for the Court of Appeals for the First Circuit should be affirmed.

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IN THE

Supreme Court of the United States

NEW PRIME, INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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REPLY BRIEF FOR PETITIONER

Rarely has a litigant in this Court gone to such lengths to distort the plain meaning of a statute. Respondent and his cadre of arbitration-hostile amici ask this Court to exempt an entire sector of workers from arbitration, disturbing a century-old understanding of the Federal Arbitration Act ("FAA"), by adopting counterintuitive interpretations not only of the phrase "contracts of employment," but also the terms "seamen," "railroad employees," and even the word "of." If respondent is to be believed, nearly every word in the Section 1 exemption means something unexpected.

There is a much simpler solution: Section 1 of the FAA means what it says. As this Court has unanimously held, "'[w]here the words of a law ... have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded.'" *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 32 (2004) (quoting *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 89–90 (1823)). "This is a maxim of law, and a dictate of common sense; for were a different rule to be admitted, no man, however cautious and intelligent, could safely estimate the extent of his engagements, or rest upon his own understanding of a law, until a judicial construction of those instruments had been obtained." *Green*, 21 U.S. at 90.

Here, the meaning of "contracts of employment" is plain and obvious: contracts establishing an employer-employee relationship. The only dictionary cited by either party defining that term traces this commonsense interpretation to 1927, just two years after the FAA was enacted. Petr. Br. at 17 (citing *Black's Law Dictionary* 393 (10th ed. 2014)). If that

weren't clear enough, the FAA limits the Section 1 exemption to *particular* contracts of employment—those of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Because seamen and railroad employees refer only to common-law employees, and not independent contractors, so too the catchall category must refer only to common-law employees. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) (applying *ejusdem generis*). Thus, Section 1 exempts the "contracts of employment" of "employees"—not exactly a linguistic enigma.

Moreover, that plain and obvious meaning of the Section 1 exemption is consistent with the reason Congress created the exemption in the first place—not to *prevent* arbitration in the transportation sector, but to preserve *industry-specific* arbitration statutes. *See Circuit City*, 532 U.S. at 121. Those industry-specific statutes applied only to common-law *employees*. Thus, redefining "contracts of employment" to include independent-contractor agreements would have the perverse effect of leaving transportation-sector independent contractors on a jurisprudential island, unique among all workers as categorically barred from agreeing to arbitrate disputes both under the FAA and the industry-specific statutes that the Section 1 exemption was meant to preserve. That cannot be—and is not—the law.

I. Applicability Of The Section 1 Exemption Has Been Delegated To An Arbitrator

As an initial matter, the underlying dispute between the parties—whether respondent was properly classified as an independent contractor or was instead a misclassified employee—should be resolved by an

arbitrator, not a court. Respondent's allegations leave no doubt that he was dissatisfied with the work he performed as an independent contractor; for whatever reason, he believes he was unable to earn a satisfactory living under that arrangement, as many other independent contractors do. Resp. Br. at 9. That is why respondent elected (as he was free to do all along) to terminate his independent-contractor agreement and become an employee of New Prime instead—a position he also left after a short period of time. J.A. 121–22.

But respondent's factual allegations, which have not yet been tested in any judicial or arbitral proceeding, have no bearing on the principal issue before this Court: Who should hear the parties' dispute? The answer to that question does not require any fact-finding because respondent does not deny signing a valid arbitration agreement with an enforceable delegation clause, under which he agreed to refer to arbitration "any disputes as to the rights and obligations of the parties, *including the arbitrability of disputes between the parties.*" J.A. 82, 102–03 (emphasis added). This Court has time and again confirmed that such delegation clauses are enforceable. *See, e.g.*, *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 75–76 (2010); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

Respondent argues that the parties' dispute cannot be delegated to an arbitrator because of the subsidiary question whether the FAA applies—an issue that respondent says does not concern "the arbitrability of disputes" between the parties. Resp. Br. at 17. It is unclear, however, what respondent thinks this appeal is about if not "arbitrability"—he wants both the underlying misclassification question and the question of FAA applicability to be resolved by a court

and opposes New Prime's efforts to arbitrate those matters. That is the very essence of an arbitrability issue.

Respondent also argues that the district court was without power to order arbitration because of the "limits the FAA places on [its] authority." Resp. Br. at 18. But the FAA does not place *any* limits on a district court's authority. Contrary to the assumption underlying respondent's position, the FAA is not a jurisdictional statute—it does not define the outer limits of federal judicial authority, as do the cases cited by respondent. *See* Resp. Br. at 18–19 (citing "cases where the contract did not involve interstate commerce, or where the statute does not provide district courts [with] jurisdiction"). The FAA is merely one procedural mechanism for compelling arbitration, which serves to preempt state laws (as well as state and federal judges) that are hostile to arbitration. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341–42 (2011). It is not the exclusive means of ordering arbitration where the parties have agreed to it.

Thus, provided a court has jurisdiction over the controversy, as the district court unquestionably did here (J.A. 111), the court has "inherent" authority to stay its own hand pending an alternative dispute resolution mechanism of the parties' choosing. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 879 n.6 (1998) (discussing "district courts' discretion to defer discovery or other proceedings pending the prompt conclusion of arbitration"); 11 Wright & Miller, *Federal Practice & Procedure* § 2901 (3d ed. 2018) ("[S]tays prior to judgment, [or] to await a decision in another forum, ... are left to the inherent power of the court."). There is no justification for the court simply to *ignore* the parties'

agreement to arbitrate threshold arbitrability issues, as respondent urges. "Having made the bargain to arbitrate, the party should be held to it." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

In any event, courts, including this Court, routinely compel parties to arbitrate threshold arbitrability questions under the FAA, even where those issues will determine the FAA's applicability. *See, e.g.*, *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1429 (2017) (compelling arbitration of the question whether an arbitration agreement was validly formed). Arbitrators are just as competent as judges to determine such issues. *See Mitsubishi Motors Corp.*, 473 U.S. at 628.[1]

II. Section 1 Does Not Exempt Independent-Contractor Agreements From The FAA

A. "The words of a statute are to be taken in their natural and ordinary signification and import." 1 James Kent, *Commentaries on American Law* 432 (1826); *see Green*, 21 U.S. at 90 ("plain and obvious meaning" controls). Indeed, the plain-meaning rule

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[1] Respondent relies on *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), for the proposition that "the 'first question' a court must answer—*before* it can compel arbitration—is whether the FAA applies at all." Resp. Br. at 15. But *Prima Paint* did not involve a delegation clause. Similarly, respondent cites *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012), and *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), for the proposition that "this Court has repeatedly decided for itself questions about whether it has authority to compel arbitration under the FAA—even where the contract at issue contained a delegation clause." Resp. Br. at 18–19. But defendants in those cases waived the right to compel arbitration under their delegation clauses.

has been described as the "most fundamental semantic rule of interpretation" because "[i]nterpreters should not be required to divine arcane nuances or to discover hidden meanings" in a legal text. Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 69 (2012) (citing Joseph Story, *Commentaries on the Constitution of the United States* 157–58 (1833)). Yet that is what respondent asks this Court to do.

Here, the term "contracts of employment" has a "plain and obvious meaning"—a contract that establishes an employer-employee relationship. That is precisely how a leading law dictionary says the term was used as early as 1927. *See Black's Law Dictionary* 393 (10th ed. 2014) (defining the term as "[a] contract between an employer and employee in which the terms and conditions of employment are stated" and tracing its origins). Respondent urges the Court to disregard this authority because it was "published nearly a century after the FAA was passed" and therefore "cannot possibly shed light on the ordinary meaning of the phrase 'contract of employment.'" Resp. Br. at 36–37. But the publication date of a dictionary has no bearing on the validity of its etymological analysis. *See Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 271–72 (2013) (citing 1989 edition of the *Oxford English Dictionary* in determining the definition of "defalcation" in 1867).

Contemporaneous legal texts are in accord. For example, a treatise on business law published in 1920 contains an entire chapter entitled "The Contract of Employment," which explains that "[a] contract of employment is a contract for the performance of services, by the terms of which the employer is to direct how

the work is to be done and what results are to be accomplished." 1 Thomas Conyngton, *Business Law: A Working Manual of Every-day Law* 302 (2d ed. 1920). Indeed, "the peculiar and distinguishing element of the contract of employment is that the party for whom the services are to be performed has the right to direct the other party in what he is to do"—a key characteristic of common-law employment. *Id.* Therefore, "[a] contract to build a house where the builder merely agrees to construct a house according to certain plans to be furnished by an architect and to the satisfaction of the person for whom he is building it"—that is, an independent-contractor agreement—"is not a contract of employment." *Id.* at 302–03.

Modern sources dedicated to explaining "contracts of employment" confirm this historical understanding. *See* Katherine V.W. Stone, "The Decline in the Standard Employment Contract: A Review of the Evidence," *in Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* 366, 366 (Katherine V.W. Stone & Harry Arthurs eds., 2013) ("The essence of the standard contract of employment was the long-term employment of an employee by a single employer over a working life."); Jeremias Prassl & Einat Albin, "Employees, Employers, and Beyond: Identifying the Parties to the Contract of Employment," *in The Contract of Employment* 341, 345 (Allan Bogg et al. eds., 2016) ("In our received understanding, the 'contract of employment is that form of contract for personal service which the courts recognize as expressing the social relationship of employer and employee, as opposed to the other relationship of employer and independent contractor.'").

Notably, respondent does not cite a single dictionary or treatise that defines "contracts of employment"

to include independent-contractor agreements.[2] Instead, he asks the Court to "divine arcane nuances" and "discover hidden meanings" in a hodgepodge of inapposite sources that no ordinary person—in 1925 or today—could be expected to compile or consult. *See* Resp. Br. at 26–30. This is exactly what the plain-meaning rule is meant to avoid.

For all the ink spilled by respondent identifying isolated instances in which the phrase "contracts of employment" was used unthinkingly to include independent-contractor agreements, those sources do not reveal anything about the *ordinary* meaning of the term—much less its ordinary meaning *as used in the FAA*. None of respondent's sources arises in the context of the FAA or arbitration, and most do not address employment classification, focusing instead on breach-of-contract and other pedestrian legal disputes.[3]

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[2] Respondent accuses New Prime of "misleadingly omit[ting] the key words 'exercising an independent employment'" from the definition of "independent contractor" in *Bouvier's Law Dictionary*. Resp. Br. at 34–35 n.6. But the omitted text is irrelevant to New Prime's point—that when the FAA was enacted, it was well established that employees and independent contractors were different. Petr. Br. at 17. If anything, the omitted phrase supports New Prime's point by confirming that, unlike employees, independent contractors do not have a dependent employment relationship with their principal.

[3] *See, e.g.*, *Bailey v. United States*, 43 Ct. Cl. 353, 355–57 (1908) ("Claimant now seeks recovery for the entire amount of compensation provided for by the terms of his contract of employment."); *Connell v. U.S. Sheet & Window Glass Co.*, 2 La. App. 93, 104 (1925) ("We recognize the right of plaintiff's attorney, under his contract of employment, ... for the amount of their professional fees on all judgments obtained by them."); *Martin v. Dixon*, 241 P. 213, 216 (Nev. 1925) ("It is contended, however, that the relation of attorney and client had ceased, and that the

"That a definition is broad enough to encompass one sense of a word does not establish that the word is *ordinarily* understood in that sense." *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 568 (2012). "The definition of words in isolation ... is not necessarily controlling in statutory construction," as "[a] word in a statute may or may not extend to the outer limits of its definitional possibilities." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006); *see also Chamber of Commerce v. Whiting*, 563 U.S. 582, 612 (2011) (Breyer, J., dissenting) ("[N]either dictionary definitions nor the use of the word 'license' in an unrelated statute can demonstrate what scope Congress intended the word 'licensing' to have *as it used that word in this federal statute*. Instead, the statutory context must ultimately determine the word's coverage.").

This is especially so where, as here, the identified usages occurred in different contexts. After all, "[w]here the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different, ... the meaning well may vary to meet the purposes of the law." *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932); *see also King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("[O]ftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context,'" and "[s]o when deciding whether the language is plain, we must read the

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court found that Dixon's contract of employment as attorney was completed."). And in several of respondent's cases, the opinion does not use the term "contracts of employment" at all; respondent instead cites the case syllabus. *See, e.g.*, *Caron v. Powers-Simpson Co.*, 104 N.W. 889, 889 (Minn. 1905); *Kaw Boiler Works v. Frymyer*, 227 P. 453, 453 (Okla. 1924); *Waldron v. Garland Pocahontas Coal Co.*, 109 S.E. 729, 729 (W. Va. 1921); *see also Johnson v. Comm'r*, 14 B.T.A. 605, 606 (1928) (findings of fact).

words 'in their context and with a view to their place in the overall statutory scheme'"). This makes eminent sense, as words often take different meanings depending on the context in which they are ... employed.

In any event, for every decontextualized source cited by respondent using the term "contract of employment" broadly, there are at least as many using the term in the ordinary sense to describe common-law employer-employee arrangements. *See, e.g.*, 1 Conyngton, *supra*, at 301–11 (repeatedly using the term "contract of employment" to describe contracts establishing common-law employment relationships); 2 Thomas Conyngton, *Business Law: A Working Manual of Every-day Law* 781–83 (2d ed. 1922) (providing form "Contract[s] of Employment"); Nicholas H. Dosker, *Manual of Compensation Law: State and Federal* 8 (1917) ("The rules for determining the existence of the relation of employer and employee are the same as those at common law for the relation of master and servant. ... Therefore, in order to recover compensation a contract of employment between the injured person and the employer ... must be shown.").

And when courts and Congress used the term *in the context of employment classification issues*, they typically excluded independent contractors. *See, e.g.*, *Coppage v. Kansas*, 236 U.S. 1, 13 (1915) ("[D]oes not the ordinary **contract of employment** include an insistence by the employer that the employee shall agree, as a condition of the employment, that he will not be idle and will not work for whom he pleases, but will serve his present employer, and him only, so long as the relation between them shall continue?"); *Newland v. Bear*, 218 N.Y.S. 81, 81–82 (N.Y. App. Div. 1926) ("The question is whether claimant's status was that of employee or independent contractor. ... The

burden was upon the claimant to establish a **contract of employment**."); *Anderson v. State Indus. Accident Commission*, 215 P. 582, 583, 585 (Or. 1923) (noting in appeal from a determination that a worker "was not a workman within the meaning of the Workmen's Compensation Act, but an independent contractor," that "[t]o create this relation [of workman] there must be a **contract of employment**"); *Brewer v. Dep't of Labor and Indus.*, 254 P. 831, 832 (Wash. 1927) ("Whether Brewer was an employee depends upon whether there was a complete and final **contract of employment**."); H.R. 10311, 69th Cong., 67 Cong. Rec. 6991 (1926) ("It shall furthermore be unlawful in the District of Columbia for any person under employment *or working for hire* to engage in labor under such **contract of employment** *or hire* on the Lord's Day, commonly called Sunday, except in works of necessity and charity.").

The Congress that enacted the FAA would have expected the Section 1 exemption, and particularly the term "contracts of employment," to be interpreted within its statutory context, rather than in the decontextualized manner urged by respondent. Contemporaneous treatises on statutory interpretation confirm as much. *See, e.g.*, J.G. Sutherland, *Statutes and Statutory Construction* 325–26 (1891) ("The particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense they were intended to be used as they are found in the act."); Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws* 318–20 (2d ed. 1911) ("[T]o arrive at the true meaning of any particular phrase in a statute, that particular expression is not to be viewed detached from its context in the statute; it is to be viewed in connection with its whole context.").

Indeed, by 1925, Congress knew how to draft a statute that covered more than just common-law employees when it so desired. It did so in the Foran Act, which prohibited immigration under any "contract or agreement ... to perform labor or service of any kind." 23 Stat. 332 (1885). It did so again in the Erdman Act, which encompasses "all persons actually engaged in any capacity in train operation or train service of any description." 30 Stat. 424 (1898). And it did so in the Adamson Act, which established an eight-hour workday for all workers "who are now or may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of person or property on railroads." 39 Stat. 721, 721–22 (1916). But it did *not* do so in the FAA.

B. The plain meaning of the term "contracts of employment" as encompassing only common-law employer-employee relationships is confirmed by reading the term, as one must, in the context of the whole statute. *See Dolan*, 546 U.S. at 486 ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.").

1. The Section 1 exemption does not apply to *all* "contracts of employment"—only contracts of employment "of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Under the doctrine of *noscitur a sociis*, the term "contracts of employment" must take its meaning from these juxtaposed terms. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995) ("[A] word is known by the company it keeps .... This rule we rely upon to avoid ascribing to one word a

meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'").

Because "seamen" and "railroad employees" are terms that encompass only common-law employees, the residual category ("any other class of workers") must share the relevant characteristics of the enumerated terms, as this Court has already held. *See Circuit City*, 532 U.S. at 114–15 ("The wording of § 1 calls for the application of the maxim *ejusdem generis*.").[4] Thus, when viewed as a whole, the Section 1 exemption applies only to the "contracts of employment" of interstate transportation "employees."

Once again, respondent engages in linguistic gymnastics to establish that "seamen" and "railroad employees" include independent contractors. Resp. Br. at 40–42. But respondent's arguments are again refuted by the ordinary meaning of those terms.

The term "seamen" is ordinarily understood to include only traditional common-law employees. Respondent suggests that "[s]eamen were defined functionally—by their work aboard a vessel—not their employment status." Resp. Br. at 40. But these are not mutually exclusive; as this Court has explained, "the essential requirements for seaman status are twofold." *Chandris, Inc. v. Latsia*, 515 U.S. 347, 368 (1995). First, "an employee's duties must contribut[e] to the function of the vessel or to the accomplishment

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[4] *Circuit City* held that the residual category must be limited to "transportation workers," as opposed to workers in other sectors, because that was the relevant distinction at issue in that case. 532 U.S. at 119. But that does not mean there can be no *other* relevant characteristic, as respondent contends. Resp. Br. at 39–40.

of its mission." *Id.* (quotation marks omitted). Second, "a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is *substantial in terms of both its duration and its nature*." *Id.* (emphasis added). Of course, the hallmark of an independent contractor is the *absence* of a substantial connection to the principal in terms of duration and nature. *See* Restatement (First) of Agency § 220(2) (1933).

Thus, although the term "seamen" can extend to a wide range of workers aboard vessels—not just those "'who can hand, reef, and steer,'" *The Sea Lark*, 14 F.2d 201, 201 (W.D. Wash. 1926)—it does not extend to independent contractors. *See id.* (the term includes "[t]he cook and surgeon, and [other] *employees*") (emphasis added).[5]

Of particular relevance is the Jones Act, which Congress passed in 1920. That statute provides that "[a] seaman injured in the course of employment ... may elect to bring a civil action at law, with the right of trial by jury, against the employer." 46 U.S.C.

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[5] Respondent states that "[a] ship's surgeon ... was an independent contractor—'not the ship owner's servant,'" yet was still deemed a "seaman." Resp. Br. at 40 (quoting *Allan v. State S.S. Co.*, 132 N.Y. 91, 99–100 (1892)). But the case he quotes did *not* hold that a physician aboard a ship was an independent contractor. Rather, the case stands for the uncontroversial proposition that a ship owner cannot interfere with a physician's discharge of his professional duties: "The physician ... in the care and attendance of the sick passengers, ... is independent of all superior authority except that of his patient, and the captain of the ship has no power to interfere except at the passenger's request." *Allan*, 132 N.Y. at 99–100.

§ 30104. As courts have long recognized, "as a prerequisite to recovery under the Act, the plaintiff must establish an employment relationship with the defendant." *Evans v. United Arab Shipping Co. S.A.G.*, 4 F.3d 207, 215 (3d Cir. 1993); *see also Bach v. Trident Shipping Co., Inc.*, 708 F. Supp. 772, 773 (E.D. La. 1988) ("It is now well established that an employer-employee relationship is essential for recovery under the Jones Act."). And it is clear that independent contractors *cannot* sue under the Jones Act. *See* David W. Robertson, *The Supreme Court's Approach to Determining Seaman Status: Discerning the Law Amid Loose Language and Catchphrases*, 34 J. Mar. L. & Com. 547, 578 n.178 (2003).

Similarly, the term "railroad employees" is ordinarily understood to cover only common-law employees—not independent contractors. Where, as here, "Congress has used the term 'employee' without defining it, [the Court] ha[s] concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–40 (1989); *see also* 1 Conyngton, *supra*, at 303 ("Independent contractors are not employees."). In fact, there is a "*presumption* that Congress means an agency law definition for 'employee' unless it *clearly indicates* otherwise." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 325 (1992) (emphases added). This presumption is not easily overcome. For example, in the Fair Labor Standards Act, "the term 'employee' had been given 'the broadest definition that has ever been included in any one act,'" *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945), but still excluded independent contractors, *see Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947).

Respondent points to no evidence that Congress "clearly indicate[d]" the term "railroad employees" in the FAA to mean anything other than common-law employees. In fact, the only support respondent can muster for his expansive and counterintuitive interpretation of the term is a handful of decisions from the Railway Labor Board ("RLB"), interpreting the Transportation Act of 1920. *See* Resp. Br. at 41–42. But the RLB was a discredited body that was roundly criticized for getting the law *wrong*, and was swiftly replaced by Congress. In 1924, one year before enacting the FAA, Congress began debating the Railway Labor Act, which disbanded the RLB when it was enacted in 1926. "It is commonplace that the 1926 Railway Labor Act was enacted because of dissatisfaction with ... the Railway Labor Board." *Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 580 (1971). And the Railway Labor Act expressly states that "[t]he term 'employee' as used herein includes every person in the service of a carrier (*subject to its continuing authority to supervise and direct the manner of rendition of his service*)"—in other words, only common-law employees. 45 U.S.C. § 151 (emphasis added).

In addition, the RLB's interpretations are irrelevant because "the powers conferred on the Railway Labor Board ... were advisory only, with no coercive effect whatsoever other than the sanction and force of public opinion." *Barnhart v. W. Md. Ry. Co.*, 128 F.2d 709, 712 (4th Cir. 1942) (citing *Penn. R.R. Sys. v. U.S. R.R. Labor Bd.*, 261 U.S. 72 (1923)).

Because "seamen" and "railroad employees" encompass only common-law employees, the residual clause "any other class of workers" must be read similarly to exclude independent contractors.

2. Respondent next urges this Court to *ignore* the meaning of "seamen" and "railroad employees" because, according to respondent, those words have no effect on the meaning of "contracts of employment." Resp. Br. at 44. This is so, says respondent, because the word "of" means "belonging to," and "[n]ouns do not change meaning based on the people to whom they belong." *Ibid.*

Again, however, respondent's argument does not comport with the ordinary way in which people use language. In plain English, a noun takes its meaning, in part, based on the context of the sentence in which it appears. Thus, the tools of a carpenter are widely understood to be different from the tools of a plumber—even though the noun "tools" is the same in both phrases. A person would not propose to his significant other with a ring of Saturn, nor take a beach vacation with the clothes of a ski instructor. That is because the word "of" does not simply mean "belonging to" in that context; it also "indicate[s] a particular example of a class denoted by the limited noun," and "denot[es] a relationship" between the words preceding and succeeding it. *Webster's New International Dictionary* 1492 (1909).

Thus, when Congress speaks of the "contracts of employment" of "seamen," "railroad employees," and other similarly situated workers, it is illuminating the types of contracts at issue.

3. Respondent's sweeping interpretation of the term "contracts of employment" is also belied by the purpose and policies underlying the FAA and the Section 1 exemption. In enacting the FAA, Congress established "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). And while the

Section 1 exemption limited the purview of the Act, it did not curtail the policy the Act embodies. The Section 1 exemption was not crafted for the purpose of exempting transportation workers from arbitration, but to funnel certain of them into a *different* arbitration regime.

As this Court has explained, "[b]y the time the FAA was passed, Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their employers," and "the passage of a more comprehensive statute providing for the mediation and arbitration of railroad labor disputes was imminent." *Circuit City*, 532 U.S. at 120–21. Accordingly, "[i]t is reasonable to assume that Congress excluded 'seamen' and 'railroad employees' from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers." *Id.* at 121.

But none of these "dispute resolution schemes covering specific workers" encompassed independent contractors. Indeed, "the history of labor arbitration is inextricably entwined with that of collective bargaining and the broader history of labor." Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 35 Fla. L. Rev. 373, 375 (1983). At the turn of the 20th Century, labor disruptions paralyzed commerce as "[r]ailroad unions increasingly relied on strikes and boycotts" to extract concessions from management, "while railroad companies preferred court orders" to break these efforts. *Id.* at 383. Beginning in 1888, Congress enacted a series of arbitration statutes designed to resolve these disputes through mediation and arbitration. At every step of the way, these statutes focused on labor unions and the common-law

employees they represented—many even went so far as to exclude "unorganized employees." *Id.* at 384. And the culmination of these efforts, the Railway Labor Act, was the direct result of "a series of conferences" between "[r]ailway executives and union officials," aimed at "drafting a new law ... [that] largely embodied the principles agreed to by employers and unions." *Id.* at 386.

As set forth above, the dispute-resolution procedures established in the Railway Labor Act apply only to common-law employees. Once again, respondent asks the Court to ignore this statute in favor of the RLB's discredited interpretations of the Transportation Act, asserting that "Congress' goal was to avoid disrupting 'developing' *and 'established'* dispute resolution schemes," and that the Railway Labor Act "didn't even exist yet." Resp. Br. at 53. But Congress began debating the Railway Labor Act—for the purpose of abolishing the RLB—in 1924, and was continuing to do so at the time it enacted the FAA. As this Court has recognized, the Railway Labor Act was an important consideration at the time Congress enacted the FAA. *See Circuit City*, 532 U.S. at 121 ("When the FAA was adopted ... the passage of a more comprehensive statute providing for the mediation and arbitration of railroad labor disputes was imminent, *see* Railway Labor Act of 1926."). Ignoring the Railway Labor Act would be especially inappropriate given that it "provided a model for other industries." Nolan & Abrams, *supra*, at 382.

Likewise, the Shipping Commissioners Act of 1872 established shipping commissioners to "hear and decide any question whatsoever between a master, consignee, agent, or owner, and any of his crew." 17 Stat.

262, 267, c. 322, § 25. The scope of this Act is coextensive with the Jones Act, which, as described above, covers only common-law employees. *See Gerradin v. United Fruit Co.*, 60 F.2d 927, 929 (2d Cir. 1932); *see also The Inland*, 271 F. 1008, 1009–10 (E.D.N.Y. 1921), *aff'd* 279 F. 1018 (2d Cir. 1922) (describing the "procedure before the shipping commissioner," and noting that "[i]f a seaman" is "discharged," then "the relation of master and servant is severed").

Respondent claims that the term "crew" in the Shipping Commissioners Act applies "'without reference to the nature of the arrangement under which they are on board,'" Resp. Br. at 51, but the case quoted for that proposition involved neither the Shipping Commissioners Act nor an issue of worker classification; rather, the question was whether a libellant qualified as a member of a ship's "crew" even if the contract of employment was void. *The Bound Brook*, 146 F. 160, 164 (D. Mass. 1906).

Adopting respondent's interpretation of the Section 1 exemption would leave independent contractors in a legal no-man's land. They would be precluded from agreeing to arbitration under *both* the FAA *and* the industry-specific regimes that the Section 1 exemption was drafted to preserve. It would also throw into jeopardy arbitration provisions in transportation agreements between companies—not only contracts between New Prime and LLCs, as in this case, but contracts between retailers and delivery companies—as respondent insists that the FAA does not apply to "*any* work agreement." Resp. Br. at 1; *see also id.* at 24 (defining "employment" to include "[w]ork or business of any kind," and clarifying that it "does not necessarily import an engagement or rendering services

for another"). It could even extend to agreements between a corporation or partnership and its shareholders or partners. *See Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 442 (2003) (presenting question whether "shareholders and directors of a professional corporation should be counted as 'employees'"). This is far outside the realm of what anybody, in 1925 or today, would expect the Section 1 exemption to encompass, and it would vitiate the FAA and the strong policy in favor of arbitration it embodies in one of the largest sectors of the American economy.

* * *

Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). And it did not do so in the FAA. This Court should interpret the Section 1 exemption consistent with its plain meaning, its statutory context, and the purpose it was enacted to achieve, and conclude that the term "contracts of employment" encompasses only contracts that purport to establish a common-law employer-employee relationship.

C. In this case, that means respondent's contract falls outside the Section 1 exemption. The Operating Agreement at issue here states that it "establish[es] an independent contractor relationship at all times," and that respondent "shall determine the means and methods of performance" of his obligations, has "the right to provide services for another carrier during the term of th[e] Agreement," and can "refuse to haul any load offered" by New Prime. J.A. 65, 86. These are classic indicia of an independent-contractor relationship—not a common-law employer-employee relationship. *See* Restatement (First) of Agency § 220. And respondent does not contend otherwise. *See* Resp. Br.

at 62 (stating only that the Operating Agreement is "exempt from the FAA" because it is "a transportation worker's agreement to perform work").

CONCLUSION

The judgment of the Court of Appeals for the First Circuit should be reversed.

Respectfully submitted.

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No. 17-340

IN THE

Supreme Court of the United States

NEW PRIME, INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") was established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. AAJ is the world's largest trial bar. AAJ is concerned that the overly broad construction of the Federal Arbitration Act advanced by Petitioner in this case undermines the right of American workers to pursue their statutory and common-law rights in a judicial forum.

SUMMARY OF ARGUMENT

Petitioner argues that the Federal Arbitration Act exemption language in Section 1 must be given a modern reading and apply only to transportation "workers" who are paid as employees. AAJ believes it is clear that all workers in the transportation sector, whether "employees" or "independent contractors," were meant to be exempted from the Act.

The FAA was adopted to streamline commercial disputes, particularly when the disputes occur in international and interstate commerce. However, when the International Seamen's Union of

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel has made a monetary contribution to its preparation or submission. Petitioner and Respondent have consented to the filing of this brief.

America and the American Federation of Labor ("AFL") objected that the proposed language might result in the FAA being applied to workers, advocates for the bill, including the American Bar Association and Commerce Secretary Herbert Hoover, advanced exemption language to alleviate those concerns. While the AFL did not represent most seamen or railroad workers in 1925, one of the largest AFL-affiliated unions and its largest transportation-based union was the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America ("Teamsters"). The Teamsters included independently contracting vehicle owner-operators as a significant part of its membership. The lobbying by the AFL in gaining an exemption for workers would surely have included all members of one of its most important affiliates, the Teamsters.

This Court found in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), that the Section 1 exemption focuses on a specific type of work — transportation work — and not on how an individual worker might be paid to perform that work. This is consistent with the interpretation of other statutes in the transportation sector that have been read to include independent contractors. Although the question of whether a worker is an employee or independent contractor can be complex in modern society, that is not an issue necessary for evaluating Section 1. Even today, the Commercial Motor Vehicle Safety Act includes "independent contractor" in its definition of employee. *See* 49 U.S.C. § 31132(2)(A).

Historically, terms such as "contract of employment," "employee," and "employer" were used when discussing either independent contractors or directly controlled employees. When Congress enacted the FAA, these words were not governed by the complicated mechanics of post-New Deal "employee" payments, including the right to benefits and the payment of taxes. In the early part of the Twentieth Century, "employers" routinely hired "independent contractors" and "owner-operators" as "employees" under "contracts of employment." That both the ABA and Commerce Secretary Hoover used the words "contracts of employment" when suggesting the exemption amendment does not in any way limit the "workers" expressly exempted by the FAA, and certainly does not require an analysis of the mechanics of their payment.

It was no doubt recognized by the AFL at the time, as is it recognized today, that worker/employer arbitration often favors employers and disadvantages workers. Forcing individuals to arbitrate single, small-value claims can also mean that individuals may not have adequate representation of their claims. The difficulty for employees and working "independent contractors" is particularly evident when arbitrating against larger employers, such as Petitioner, who substantially benefit from a "repeat player" bias.

Finally, Petitioner's argument that labeling Respondent an "independent contractor" in the agreement is dispositive on the question of whether Section 1 applies is simply wrong. Courts look

beyond the designations and labels in an agreement to the true nature of the transaction and relationship of the parties when interpreting an agreement. This is particularly true in the context of determining whether a worker is an employee or independent contractor, as the advantages of such misclassification have become profound in the past twenty years and, as a result, misclassification has proliferated to the disadvantage of compliant businesses and all taxpayers generally.

Ultimately, the payment status of Respondent is less important than the language of Section 1 and its historical context. Respondent and anyone else driving a vehicle for a living have always been considered workers in interstate commerce, thereby falling squarely within the Section 1 exemption. When read in context with the legislative history and the relationship of the AFL with the Teamsters, it is clear that Respondent is exempted from arbitrating his claims by Section 1.

ARGUMENT

Section 1 of the Federal Arbitration Act ("FAA") states that the Act does not apply to "contracts of employment of seamen, railroad employees, ***or any other class of workers*** engaged in foreign or interstate commerce." 9 U.S.C. § 1 (emphasis added). Petitioner argues that this broadly worded exemption must be read extremely narrowly to apply only to expressly designated "employees" engaged in interstate commerce rather than all "workers" in the transportation sector,

including "independent contractors." Using this extremely narrow construction of the word "worker," Petitioner argues that the express exemption found in the statute cannot be read to apply to any "independent contractors" who performed the work of driving a vehicle.

Petitioner's narrow construction belies the history behind the enactment of the FAA, Congressional intent, and basic principles of contract construction as applied by this Court and elsewhere. Independent vehicle owner-operators and others contracting to perform work themselves certainly existed at the time the FAA was passed, and had Congress not wished the exemption to apply to all who actually worked in the transportation sector, it would have said so.[2]

I. The AFL, Representing the Teamsters Union, Successfully Lobbied to Have All Transportation Workers Exempted from the FAA, Including Respondent, Without Regard to Whether the Worker Was Paid

[2] The work at issue here is driving a type of vehicle, namely a truck, for commercial purposes. Whether the driver owns a rig outright, is driving a rig involved in a lease arrangement (however complicated), or is simply an employee paid to drive the rig, the work being performed is the same. As AAJ believes that it is clear that the Section 1 exemption was drafted to exempt the worker who is actually performing that work, this brief will neither address the complicated subject of vehicle ownership nor the mechanism by which the working driver is paid – whether as an "independent contractor" or employee. The bottom line is that in every permutation of these variables the work itself does not vary.

as an "Employee" or "Independent Contractor."

The history and policy behind the Section 1 exemption in the FAA for transportation workers is contrary to Petitioner's and its *amici* supporters' insistence that arbitration must be made mandatory for Respondent. That history makes it clear that the framers of the FAA undoubtedly meant to exempt all individual working drivers from its dictates.

Amicus Cato Institute discusses the Congressional history of the exemption language. *See* Cato Br. 25-28. To summarize, the exemption was inserted into the text of the bill in response to objections from the International Seamen's Union of America and the American Federation of Labor ("AFL"). At hearings on the bill in 1923 it was made clear that "it was not the intention of this bill to make an industrial arbitration in any sense."[3]

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[3] W.H.H. Piatt, a lawyer from Kansas City, MO who was the chairman of the Committee on Commerce, Trade, and Commercial Law of the American Bar Association, testified on the FAA bill which was being heavily promoted by the ABA. After he made the above statement, which is quoted in the Cato Institute's brief, Piatt continued:

> [A]nd so I suggest in as far as this committee is concerned, if your honorable committee should feel there is any danger of that, they should add to the bill the following language: "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce." *It is not intended that this shall be an act referring to labor disputes at all. It is purely an act to give the merchants the right or*

Hearing Before a Subcommittee of the Committee on the Judiciary, United States Senate, 67th Cong., 4th Sess., 9 (Jan. 3, 1923) [hereinafter "1923 Hearing"]. As part of the Hearing, Commerce Secretary Herbert Hoover also submitted a letter in response to the same objections. That letter stated the following: "[I]f objection appears to the inclusion of workers' contracts in the law's scheme, it might well be amended by saying 'but nothing herein shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate commerce.'"[4] 1923 Hearing at 14. Hoover's letter thus included the basic text for what was later adopted. According to the

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> *the privilege of sitting down and agreeing with each other as to what their damages are if they want to do it.* Now, that is all there is in this.

1923 Hearing at 9 (emphasis added). *See also* Ian R. Macneil, *American Arbitration Law* 89-91 (1992).

Shortly thereafter, Senator Thomas J. Walsh of Montana articulated a problem that the objecting unions had with the bill:

> [I]t is the same with a good many contracts of employment. 'These are our terms. All right, take it or leave it.' Well, there is nothing for the man to do except to sign it, and then he surrenders his right to have his case tried by the court, and he has to have it tried before a tribunal in which he has no confidence at all.

1923 Hearing at 9.

[4] Secretary Hoover's letter offered essentially the same language as the ABA, except for the addition of "railroad employees." 1923 Hearing at 14.

Proceedings of the Forty-Fifth Annual Convention of the American Federation of Labor 52 (1925):

> "Protests from the American Federation of Labor and the International Seamen's Union brought an amendment which provided that 'nothing herein contained shall apply to contracts of employment of Seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce.' This exempted labor from the provisions of the law, although its sponsors denied it was their intention to include labor disputes."

Quoted in Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 127 n.8 (2001) (Stevens, J., dissenting).

After quoting these contemporaneous documents, the Cato Institute jumps to the conclusion that in making its objection, the AFL was speaking on behalf of what they describe as "traditional employees . . . typically represented by labor unions." Cato Br. 27-28, arguing that it was for the protection of railroad workers that the AFL objected. However, up through 1926 none of what were referred to as the "Big Four" railroad labor organizations (Brotherhood of Locomotive Engineers, Order of Railway Conductors of America, Brotherhood of Locomotive Firemen and Engineers, and Brotherhood of Railroad Trainmen) had ever been affiliated with the AFL. *Organization and*

Membership of American Trade Unions, 23(2) Monthly Lab. Rev. 8, 12 (Aug. 1926), *available at* http://www.jstor.org/stable/41860265 ("These organizations have always maintained their position independent of the American Federation of Labor, and have so thoroughly controlled their field that no question of jurisdiction or dual unionism has arisen.").

Clearly, it is hard to believe that the AFL would have invested its resources in lobbying on behalf of a group of workers who were not part of its membership. After all, the AFL had a vast membership of its own to be concerned about, as it was "divided into 115 national and international unions" (Jay Newton Baker, *The American Federation of Labor*, 22 Yale L.J. 73, 74 (1912)), which did not include the "Big Four" railroad labor organizations. In fact, in 1925 the largest AFL-affiliated transportation-based membership union was the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America ("Teamsters") with 100,000 members. *Organization and Membership of American Trade Unions*, at 13.

At the urging of Samuel Gompers, then the head of the AFL, the Teamsters was formed in Niagara Falls, NY in August 1903. *See* Teamsters, *The First Teamsters: Building a Union*, http://teamster.org/content/first-teamsters-building-union (last visited July 23, 2018). After its formation, the Teamsters was quickly granted a Certificate of Affiliation by the AFL and remained an affiliate until 1957. Teamsters, *Teamster History*

Visual Timeline, https://teamster.org/content/teamster-history-visual-timeline (last visited July 23, 2018). Significantly, through at least 1925 the worker membership in the Teamsters was not restricted to "employees." Both the 1915 Constitution and Bylaws of the International Brotherhood of Teamsters and the next Constitution, the 1925 Constitution and Bylaws of the International Brotherhood of Teamsters, describe Teamster membership as follows:

> No person shall be entitled to membership in this organization ***who owns or operates more than one team or*** vehicle. The General Executive Board, . . . may allow a man to own more than one team or vehicle to ["and" replaced "to" in 1925] hold membership, provided that he hires or employs none but members of our International Union and ***that he drives a vehicle himself*** [.]

Constitution of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers, at p.38 (1915), *available at* http://babel.hathitrust.org/cgi/pt?id=uiug.30112073508951;view=1up;seq=5;size=150; Constitution and By-Laws of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, at p.4 (Dec. 1, 1925) (emphasis added).

These owner-operators were a significant part of the Teamster workforce. *Amicus curiae* for

Petitioner, American Trucking Associations, Inc., highlights the importance of owner-operators to the trucking industry and notes that their "role in trucking operations has a history essentially as long as the industry itself." American Trucking Associations Br. 4 (citing *Ex Parte* No. MC 43 (Sub-No. 12), Leasing Rules Modifications, 47 Fed. Reg. 53858, 53860 (Nov. 30, 1982), which states that "prior to the Motor Carrier Act of 1935, motor carriers regularly performed authorized operations in non-owned vehicles. To a large extent, ownership of these vehicles was vested in the persons who drove them, commonly referred to as owner-operators.").

Clearly, anyone lobbying for the AFL at any time between 1923 and 1925 would have done so on behalf of the members of its affiliated unions and certainly would have advocated on behalf of the drivers of the Teamsters, a union formed at the direct request of the AFL. Indeed, Teamsters' President Daniel Tobin was a member of the AFL's executive counsel and was even Samuel Gompers' campaign manager when Gompers successfully won reelection as the AFL's president in 1921,[5] and the refusal of Teamsters to cross picket lines was often critical to the success of labor actions.[6] Further, the

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[5] Robert D. Leiter, *The Teamsters Union: A Study of Its Economic Impact*, New York, Bookman Associates, Inc., p. 38 (1957), *available at* http://archive.org/details/teamunionst00leit.

[6] *See, e.g.*, *Strike Paralyzes Railway Express*, N.Y. Times (Oct. 14, 1919), *available at* http://www.nytimes.com/1919/10/14/archives/strike-paralyzes-railway-express-embargo-ordered-

Teamsters was one of the largest AFL-affiliated unions and the largest affiliated transportation-worker union. It strains credulity to think that the AFL, in lobbying on behalf of its affiliates, would have cut out a crucial portion of the Teamsters' membership when successfully negotiating changes to the FAA between 1923 and 1925, much less bragging about those changes in 1925.

II. That Congress Meant to Exempt All Workers in the Transportation Sector from the FAA, Not Limited to How That Worker Happened to Be Paid, Is Consistent with This Court's Prior Decisions and Other Congressional Action.

As this Court has stated, any question of statutory interpretation starts with an Act's language. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). The meaning of statutory language "is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.*

The descriptive language of the Section 1 exemption focuses on the specific type of work and not the mechanics of paying the individual worker doing that work. Given the exemption's inclusion in the law, it must be concluded that Congress

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on-all-shipments.html; *Fight to Finish Opens on Unions in Trucking Tieup*, N.Y. Times (May 26, 1920), *available at* http://www.nytimes.com/1920/05/26/archives/fight-to-finish-opens-on-unions-in-trucking-tieup-wrath-of-whole.html.

intended to limit it only to categories of work — railroad, maritime, and, at minimum, other transportation — not concerning itself with the legal mechanics of how workers were paid to perform the work. This interpretation is consistent with this Court's only prior decision interpreting the Section 1 exemption, where the Court found that the exemption was focused on contracts of employment for "specific categories of workers," such as "seamen," "railroad employees," and "any other class of workers" engaged in transportation activities. *Circuit City Stores, Inc.*, 532 U.S. at 114. Because the plain language centers on the type of work being performed rather than the status of the person performing it, the exemption was certainly written to apply to all transportation workers. There is no basis to exclude "independent contractors" when they actually performed the work in question, because there can be no question that they were "workers" in the transportation sector.

Generally, laws that cover a particular industry or category of worker apply to all workers in that arena. With respect to those statutes, "[i]f the worker did a particular type of work or worked in a particular industry, then he enjoyed the benefit of the law's protection without regard to the extent of the employer's control over the performance of the work." *See* Richard Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 Berkeley J. Emp. & Lab. L. 295, 308 (2001).

Other statutes that applied to workers in the transportation sector have been interpreted to include such independent contractors. Statutes relating to "seamen" focused on whether the individual performed the work of a seaman, not on whether the individual was paid as an employee or an individual contractor. *See, e.g., McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 355 (1991). Regarding the specific wording of the FAA exclusion, in *Circuit City Stores, Inc.*, this Court stated:

> As for the residual exclusion of "any other class of workers engaged in foreign or interstate commerce," Congress' demonstrated concern with transportation workers and their necessary role in the free flow of goods explains the linkage to the two specific, enumerated types of workers identified in the preceding portion of the sentence.

532 U.S. at 121.

In fact, even had Congress used the word "employee" instead of the much broader term "worker," the resulting understanding of Congressional intent would be no different. In definitions related to the Commercial Motor Vehicle Safety, Congress expressly provided:

> "[E]mployee" means an operator of a commercial motor vehicle (***including an independent contractor when***

> ***operating a commercial motor vehicle***) . . . who directly affects commercial motor vehicle safety in the course of employment.

49 U.S.C. § 31132(2)(A) (emphasis added).

The accompanying regulations similarly define "employee" broadly as including "a driver of a commercial motor vehicle (including an ***independent contractor*** while in the course of operating a commercial motor vehicle)." 49 C.F.R. § 390.5 (emphasis added). *See, e.g., Sharpless v. Sim*, 209 S.W.3d 825, 829 (Tex.App.—Dallas 2006); *Amerigas Propane, LP v. Landstar Ranger, Inc.*, 109 Cal. Rptr. 3d 686, 698 (Cal. App. 2010). If this is true when the word "employee" is used, certainly the much broader term "worker" – with no underlying legal meaning but only a meaning descriptive of the actual job performed – was meant to include anyone performing actual transportation work.

III. In Historical Context the Use of the Term "Contracts of Employment" Was Routinely Used to Include the "Employment" of "Independent Contractor" Drivers and, Hence, Not Meant to Exclude Any Drivers from the Benefit of the Lobbied-For Exemption.

Petitioner relies on Section 1's use of the phrase "contracts of employment" to argue that "non-employees" cannot fall within the exemption. First, by focusing only on the phrase, "contracts of

employment," Petitioner distorts the exemption and is forced to ignore that Section 1 exempts "any other class of ***workers*** engaged in foreign or interstate commerce," not merely "any other class of ***employees***." (emphasis added). 9 U.S.C. § 1. Moreover, in the general parlance of the early 20th Century, descriptive words such as "worker," "employer," and "contract of employment" were as a rule used to describe the type of work performed rather than referring to more modern legal distinctions emanating from post-New Deal tax and benefit relationships and mechanics of pay. As such, when both the ABA and Commerce Secretary Hoover suggested the use of the wording "contracts of employment" in 1923, neither the ABA, the Secretary, nor Congress would have understood there to be any need to clarify further that non-employee drivers were included among those "workers" entering into "contracts of employment."

Before the 1930's, even the word "employee" on its own did not exclude independent contractors. When there was no reason to distinguish between different kinds of workers, the word "employee" was often used to refer to any worker, including independent contractors. *See, e.g., Railway Employees' Dep't, A.F.L. v. Indiana Harbor Belt Railroad Co.*, Decision No. 982, 3 Dec. U.S. R.R. Lab. Bd. 332, 337 (1922) (explaining that in the Transportation Act of 1920, when Congress referred to "railroad employees[,] it undoubtedly contemplate[d] those engaged in the customary work directly contributory to the operation of the railroads"—including independent contractors).

At the time of the drafting of the FAA, "independent contractors" in the transportation industry were often described as individuals engaged in "independent employment." *See, e.g., City of Chicago v. Robbins*, 67 U.S. 418, 425 (1862) (describing a skillful contractor exercising an "independent employment" as an independent contractor); *Kreipke v. Comm'r of Internal Revenue*, 32 F.2d 594, 596 (8th Cir. 1929) (defining an "independent contractor" as one who is "exercising an independent employment"); *Du Bois Electric Co. v. Fidelity Title & Trust Co.*, 238 F. 129, 131 (3d Cir. 1916) (similar).

Independent contractors were frequently referred to as "employed." *See, e.g., The Bjornefjord*, 271 F. 682, 683 (2d Cir. 1921) (". . . due to the negligence of an independent contractor employed by them. . ."); *Maryland Dredging & Contracting Co. v. State of Md.*, 262 F. 11, 13 (4th Cir. 1919) (". . . on the ground that its owner was employed as an independent contractor."); *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 30 (1922) ("[T]he party employed was an independent contractor."); *The Indrani*, 101 F. 596, 598 (4th Cir. 1900) ("If an independent contractor is employed"); *Woodward Iron Co. v. Limbaugh*, 276 F. 1, 2 (5th Cir. 1921) (". . . which Waters was employed to do as an independent contractor."); *W. A. Arthur v. Texas & P. Ry. Co.*, 204 U.S. 505, 516-17 (1907) (describing "an independent contractor" as "employed . . . to do work"); *James Griffith & Sons Co. v. Brooks*, 197 F. 723, 725 (6th Cir. 1912) ("[T]he company . . . employed him as an independent contractor."); *Pioneer S.S. Co. v.*

McCann, 170 F. 873, 877 (6th Cir. 1909) ("[W]hen a shipowner has employed an independent contractor . . .").

It was also true that those who hired independent contractors were called their "employers." *See, e.g., McClaren v. Weber Bros. Shoe Co.*, 166 F. 714, 719 (1st Cir. 1909) ("In other words, ordinarily, where work of this kind is done by a skilled independent contractor, the law holds that the employer . . . "); *Middleton v. P. Sanford Ross*, 213 F. 6, 10 (5th Cir. 1914) (". . . the employer of the independent contractor."); *Murch Bros. Const. Co. v. Johnson*, 203 F. 1, 4 (6th Cir. 1913) ("The doctrine of independent contractor is that one who lets work to be done by another according to such other's own methods and without being subject to the control of his employer. . ."); *Dwyer v. National S.S. Co.*, 4 F. 493, 498 (E.D.N.Y. 1880) ("If an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commits some casual act of wrong or negligence, the employer is not answerable. (citation omitted)").

Unsurprisingly, numerous cases during this period refer to independent contractors' agreements to perform work as "contracts of employment." *See, e.g., West Hartlepool Steam Navigation Co. v. Benemelis S.S. Co.*, 1914 WL 1962, 12 Teiss 3, 5 (La. Ct. App. 1914) ("It devolves upon him who relies upon the defense of independent contractor to plead and prove the nature of the contract of employment . . ."); *Caron v. Powers-Simpson Co.*, 104 N.W. 889, syllabus (Minn. 1905) (". . . where there is dispute of

fact as to whether the contract of employment was made with an independent contractor . . . is for a jury . . ."); *Tankersley v. Webster*, 243 P. 745, 747, (Okla. 1925) ("[T]he contract of employment . . . conclusively shows that Casey was an independent contractor."); *Lindsay v. McCaslin*, 122 A. 412, 413 (Me. 1923) ("When the contract of employment has been reduced to writing, the question whether the person employed was an independent contractor or merely a servant is determined by the court as a matter of law."); *Drennon v. Patton-Worsham Drug Co.*, 109 S.W. 218, 219 (Tex. App. 1908) ("Where the work is done, however, in the manner and by the means contemplated in the contract of employment, and the contractor is performing the work strictly in the manner expressly or impliedly directed by the employer, the latter cannot escape liability by the plea that an independent contractor committed the act."); *Waldron v. Garland Pocahontas Coal Co.*, 109 S.E. 729, syllabus (W. Va. 1921) ("Whether a person performing work for another is an independent contractor depends upon a consideration of the contract of employment, the nature of the business, [and] the circumstances under which the contract was made and the work was done."). *See also, e.g.*, *U.S. Fid. & Guar. Co. of Baltimore, Md., v. Lowry*, 231 S.W. 818, 822 (Tex. Civ. App. 1921) (whether a person is an independent contractor or employee depends upon whether the "contract of employment" gives the employer the right "to control the manner and continuance of the particular service and the final result" (citation omitted)); *Hamill v. Territilli*, 195 Ill. App. 174, 176 (1915) ("Appellant strongly contends that under the contract of employment

Territilli and Scully were independent contractors.").

Thus, when Secretary Hoover and attorney Piatt, representing the ABA, each suggested the use of the words "contracts of employment," they would have understood this phrase to be the generic terminology used to describe agreements under which teamsters — that is, truck drivers — worked. *See, e.g., Luckie v. Diamond Coal Co.*, 41 Cal. App. 468, 477 (1919) (explaining that a motor truck lessee performing transfer and delivery services under a "written contract of employment" could be either "an independent contractor or [a] servant" depending on how the work was actually performed).[7]

IV. Mandatory Individual Arbitration for Far-Flung Transportation Workers Places Them at a Distinct Disadvantage Inconsistent with Congressional Intent That These Critical Workers Would Not be Subject to the FAA.

Today, just as in 1925, those working in the commercial trucking industry, including "independent contractors" who drive their own rigs,

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[7] A contemporaneous article, *Teamster as Independent Contractor Under Workmen's Compensation Acts*, 42 A.L.R. 607, 617 (1926), distinguishes these two types of "employment" of "independent contractors" in greater detail: "When the contract of employment is such that the teamster is bound to discharge the work himself, the employment is usually one of service, whereas, if, under the contract, the teamster is not obligated to discharge the work personally...the employment is generally an independent one." (citing cases).

frequently stand unequally when they are engaged in a legal dispute with those who pay for their work. Often, they reside hundreds if not thousands of miles away from those who employ them. Yet, by contract the one that pays for their services generally sets up where the arbitration may take place and what law is to be followed. Large national or regional employers also have the advantage of frequent association with the same arbitral forum and even at times the same arbitrators.

Amici Chamber of Commerce of the United States of America and the Society of Human Resource Management [collectively referred to as "*amici* Chamber"] state in their *amici* brief [hereinafter "Chamber Br."] that workers benefit from arbitration. Chamber Br. 12-14. Empirical evidence contradicts these claims.

Arbitration has actually proven to be an ineffective mechanism, especially for protecting transportation workers, who, as has been stated, are often disbursed throughout the nation and distant from those paying for their services. This is demonstrated by the fact that even before employers began routinely including arbitration provisions in their mandatory employment agreements, the number of workers filing workplace claims in arbitration dropped substantially, and the amount of those workers' recoveries was comparatively low. *See, e.g.*, Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679 (2018) (citing recent empirical studies and analyzing structural causes); Judith Resnick, *Diffusing*

Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights, 124 Yale L.J. 2804, 2813-14 (2015); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 Yale L.J. 3052 (2015); Jean R. Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 Brooklyn L. Rev. 1309 (2015); Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 Berk. J. Emp. & Lab. L. 71 (2014) [hereinafter "Colvin 2014"]; Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. Empirical Legal Stud. 1, 6 (2011).

Many attorneys are also unwilling to take individual arbitration cases because a plaintiff's chances of winning in arbitration are so low and often costlier than pursuing the matter in court (and certainly when the alternative is the ability to pursue the grievance collectively). *See* Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, Economic Policy Institute (Dec. 7, 2015), *available at* http://www.epi.org/publication/the-arbitration-epidemic/. This lack of representation not only acts as a barrier to entry, but also reduces the likelihood of a successful outcome in arbitration. *See generally* Colvin 2014, *supra* (summarizing information from multiple studies); Estlund, *supra*. For instance, one study found that employees recovered compensation in only 21.4 percent of arbitrations as compared to 57 percent of state court employment cases, and that the median award was

over $30,000 less in arbitrations than in state court cases. Colvin 2014, *supra*, at 79-80.

Few employees subject to arbitration agreements bring small claims, because the cost of doing so, including time and travel costs, can easily outweigh any potential benefit. When they do bring claims, regardless of size, they achieve systematically worse results against employers. *See, e.g.*, David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DePaul L. Rev. 457, 462 (2016). For example, individual employees who avail themselves of telephonic hearings, which are often touted as a uniquely informal device that facilitates access to arbitration, have win rates that are significantly lower than those who do not take advantage of the informal procedure. *Id.* at 492.[8]

Moreover, although such informal procedures ostensibly allow employees to present claims without the assistance of lawyers, unrepresented

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[8] There is also no empirical evidence to suggest that arbitration provisions result in savings to consumers. In its 2015 Report to Congress, the Consumer Financial Protection Bureau found that pre-dispute arbitration clauses in the consumer financial products or services setting did not result in lower costs to consumers, stating, "[W]e did not identify statistically significant empirical support for the claim that companies pass cost savings relating to their use of pre-dispute arbitration clauses to consumers." Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, Section 10.3 p. 19 (March 2015) *available at* https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

employees prevail just 7 percent of the time. When represented, their success rate nearly triples, as employees represented by lawyers prevail between 19 percent and 28 percent of the time. *Id.* at 485; *see also* Alexander Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors & Outcomes*, 68 Indus. & Lab. Rel. Rev. 1019, 1037 (2015) [hereinafter "Colvin & Gough"] (observing that self-represented employees have lower success rates, lower damages awards, and greater susceptibility to repeat player effects).

Citing the twenty-year-old article Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 46 (1998), *amici* Chamber maintain that "employees who arbitrate their claims are more likely to prevail than those who go to court" and that this applies with "equal force to independent contractors." Chamber Br. 12. They support this by referring to Maltby's characterization of an article by Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Empl. Rts. & Employ. Pol'y J. 189, 210 (1997). However, the Bingham article does not compare litigation outcomes with arbitration outcomes. It compares outcomes of employees arbitrating against "Repeat Player" employers with those arbitrating against "non-Repeat Player" employers. When the employer is a "repeat player," employees succeeded in recovering damages just 16% of the time, more than four times worse than arbitrating against employers who were not repeat players. *Id.* Because these *amici* have taken these underlying statistics out of context, the meaning of

the success rate they attribute to employees is not useful.[9]

In their struggle to find additional support for their position, *amici* Chamber cite a report compiled by the National Workrights Institute, which relies on two Bingham reports, the Maltby article, and a fourth report, "Eisenberg," to claim that employees who arbitrate have an overall 62 percent success rate. This study appears to build on the same erroneous findings *amici* Chamber cite originally.[10] Additionally, the National Workrights study concludes that the "number of studies, and the size of the data sets involved, is too small to draw conclusions." The National Workrights Institute, *Employment Arbitration: What Does the Data Show?*, https://web.archive.org/web/20101202200115/http://workrights.org/current/cd_arbitration.html (last visited July 9, 2018).

Similarly, another article *amici* Chamber cite notes that "the figures on arbitration and court litigation are all over the plot." Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 Ohio St. J. on Disp. Resol. 1, 16 (2017). But St. Antoine does identify a significant difference in the success rates of higher-paid employees and lower-paid employees (*id.*), and lower-paid employees would include

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[9] Also, these statistics do not account for the people who cannot bring claims because the potential damages are too small.

[10] Due to the lack of internal citations in the study, it is difficult to evaluate these findings with more specificity.

Respondent and those similarly situated to Respondent.

In addition, when individuals do participate in arbitration proceedings, there is evidence that the arbitrators tend to favor the "repeat player" corporations that appear before them and pay them on a regular basis. Where a corporation, such as Petitioner, can force hundreds, if not thousands, of individuals into arbitration, there is a documented bias that results in favor of the corporate entity. This "repeat player" bias issue is also well-documented in academic studies.[11]

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[11] The press has also recognized this "repeat player" bias. *See* Jessica Silver-Greenberg and Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. Times, Oct. 31, 2015, http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html ("[T]he rules of arbitration largely favor companies, which can even steer cases to friendly arbitrators, interviews and records show."); Jessica Silver-Greenberg and Michael Corkery, *In Arbitration, a 'Privatization of the Justice System,'* N.Y. Times, Nov. 1, 2015, http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html ("[Arbitration R]ules tend to favor businesses, and judges and juries have been replaced by arbitrators who commonly consider the companies their clients, The Times found.... 'This is a business and arbitrators have an economic reason to decide in favor of the repeat players.'"). Further, "in interviews with The Times, more than three dozen arbitrators described how they felt beholden to companies. Beneath every decision, the arbitrators said, was the threat of losing business. [¶] Victoria Pynchon, an arbitrator in Los Angeles, said plaintiffs had an inherent disadvantage. 'Why would an arbitrator cater to a person they will never see again?' she said." *Id.*

A recent study[12] by Colvin & Gough, *supra*, found that:

1) Earlier academic research on repeat player effects in arbitration have generally supported the existence of a repeat player effect and that employers involved in multiple arbitration cases tend to do better than first-time participants. *Id.* at 1023-25.
2) On average, each previous interaction between a given employer and an arbitrator decreases the odds of an employee's winning. When all other independent variables are controlled, the probability an employee will win her case when bringing it before a first-time employer-arbitrator pairing is 17.9%, but if the defending employer had four previous interactions with the arbitrator, the probability decreases to 15.3%, a 14.9% decrease. If there were 25 previous interactions between an employer-arbitrator pairing, the probability declines to 4.5%, a 75% decrease relative to first time pairings. *Id.* at 1031-1035.
3) Even when they controlled for employer size and experience in arbitration, every

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[12] Colvin's and Gough's study used a database of American Arbitration Association ("AAA") arbitrations. Colvin & Gough pp. 1026-27. AAA is a non-profit organization and its neutrals only make money on the cases they personally handle. In contrast, JAMS is a "for-profit" entity and its owner-neutrals also make money on cases they do not personally handle. Because the economic incentives are greater, there is no reason to believe that the repeat player effect would be lessened at all in JAMS arbitrations.

> additional interaction between an employer and an arbitrator resulted in reduced employee outcomes as measured by (a) win rates and (b) monetary award amounts. "One possible explanation for this relationship is that some arbitrators may be responding to economic incentives and issuing favorable awards to repeat clients." *Id.* at 1037.
>
> The authors conclude:
>
> > Justice in mandatory arbitration is not blind if parties are able to gain an advantage . . . especially if there are gains from doing repeat business with the same arbitrator.
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> *Id.* at 1040.

V. Labels Attached by Petitioner to the Agreement It Prepared Cannot Be Dispositive.

Even if the distinction as to whether Respondent is an employee or independent contractor were germane, that is not an analysis that can be blindly accepted based upon the mere fact that Petitioner elected to include the words "independent contractor" in the underlying agreement it prepared. It is well-settled that in determining the relationships between parties and the true nature of an agreement, courts will look beyond the formal designations and labels in the agreement. *See, e.g., Union Pac. Ry. Co. v. Chicago,*

R.I. & P. Ry Co., 163 U.S. 564, 582 (1896) (what the agreement "was styled by the parties does not determine its character or their legal relations..."); *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 354 (1922) (a debtor does not become the agent of his creditor simply because he is called an agent); *Topping v. Trade Bank of N.Y.*, 86 F.2d 116, 117-18 (2d Cir. 1936) (a usurious loan is not made lawful by falsely terming it a sale . . . or a corporate obligation); *Sorah v. Sorah*, 163 F.3d 397, 401 (6th Cir. 1998) (instructing bankruptcy courts to look beyond the label applied in the decree to determine whether a debtor's obligation to a spouse arising from a divorce decree "is actually support" and not dischargeable); *see generally K.C. Air Cargo Services, Inc. v. City of Kansas City*, 523 S.W.3d 1, 7 (Mo. Ct. App. 2017) ("[Courts] are to interpret a contract by what its language means rather than by the definition of certain terms or what the parties call it."); *East Ramapo Cent. School Dist. v. Mosdos Chofetz Chaim, Inc.*, 36 N.Y.S.3d 344, 345 (2016) ("It is well settled that an agreement's characterization is not determinative of the nature of the transaction; 'rather, the true nature of the transaction must be gleaned from the rights and obligations set forth therein' (citations omitted)").

Numerous courts, including this Court, have found that the simple designation of a worker as an independent contractor on the face of an agreement is not determinative of the relationship between the parties. *See, e.g., Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992) (employment status depends on all of the factual incidents of the

relationship); *Campbell v. Washington County Technical Coll.*, 219 F.3d 3, 7 (1st Cir. 2000) ("Maine courts follow the oft-stated rule that the legal relationship between the parties does not turn on the label the parties themselves attach."); *Sharkey v. Ultramar Energy Ltd.*, 70 F.3d 226, 232 (2d Cir. 1995) (employment or agency status "not determined solely by the label used in the contract between the parties"); *Morey v. Western Am. Specialized Transp. Servs., Inc.*, 968 F.2d 494, 498 n.5 (5th Cir. 1992) (contractual designation of trucker as "independent contractor" held "not determinative"); *Craig v. FedEx Ground Package Sys., Inc.*, 686 F.3d 423, 427 (7th Cir. 2012) (each case must be decided on its own facts and circumstances); *Northern v. McGraw-Edison Co.*, 542 F.2d 1336, 1343 n.7 (8th Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977) (an employee does not become an independent contractor simply because a contract describes him as such); *Slayman v. FedEx Ground Package System, Inc.*, 765 F.3d 1033, 1042 (9th Cir. 2014) (under Oregon law, "a contract's recitation of an independent-contractor relationship is not dispositive."); *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1492 (11th Cir. 1993) (the employment status of an individual for the purposes of ERISA is not determined solely by the label used in the contract between the parties).

Indeed, in recent times, so many advantages have been found to exist in misclassifying employees as "independent contractors" that such misclassification of employees has become a pervasive issue throughout the nation. Between

February 1999 and February 2005, the number of workers classified as independent contractors in the United States grew by 25.4 percent. *See* U.S. Government Accountability Office, *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification*, GAO-06-656, App. III. Tbl.4 p.47 (July 2006), *available at* http://www.gao.gov/assets/260/250806.pdf (showing changes in size of contingent workforce). The U.S. Department of Labor's Employment and Training Administration found that between 2010 and 2017 the number of misclassified employees discovered as part of audits increased from 206,626 to 347,320 even though fewer audits were conducted. U.S. Department of Labor, *Unemployment Insurance Tax Information*, Calendar Year 2010, http://oui.doleta.gov/unemploy/pdf/UI_taxinfo/2010/MisclassifiedEmployees.pdf; U.S. Department of Labor, *Unemployment Insurance Tax Information*, Calendar Year 2017, http://oui.doleta.gov/unemploy/pdf/UI_taxinfo/2017/MisclassifiedEmployees.pdf.

Another study commissioned by the U.S. Department of Labor found that up to 30 percent of audited employers misclassified workers. Lalith de Silva, et al., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, p.iii (Feb. 2000) http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf.

Courts also have recognized that this is a growing concern. *Craig*, 686 F.3d at 430-31 ("The number of independent contractors in this country is

growing" because of the "economic incentives for employers to use independent contractors and there is a potential for abuse in misclassifying employees as independent contractors.") The *Craig* court also recognized that this misclassification results in significant costs to the government: "'[B]etween 1996 and 2004, $34.7 billion of Federal tax revenues went uncollected due to the misclassification of workers and the tax loopholes that allow it.' 156 Cong. Rec. S7135–01, S7136 (daily ed. Sept. 15, 2010)." *Id.* at 431. In addition, a 2010 study estimated that misclassifying by employers shifts $831.4 million in unemployment insurance taxes and $2.54 billion in workers' compensation premiums from those misclassifying to law-abiding businesses annually. Douglas J. McCarron, *Worker Misclassification in the Construction Industry: Time to Stand Up for Law-Abiding Employers*, Construction Labor Report, BNA Insights (April 7, 2011), http://web.carpenters.org/Libraries/PDFs_Misc/Construction_Labor_Report_--_McCarron_on_Misclassification_4-7-2011_sm.sflb.ashx.

* * *

In 2018, this Court addressed the FAA in *Epic Sys. Corp. v. Lewis*, 584 U.S. ___, 138 S.Ct. 1612, 1625 (2018). In so doing, this Court noted that there was no "clear and manifest congressional command" to displace the FAA when passing the NLRA, and specifically pointed to the fact that the NLRA does not mention class or collective action procedures. *Id.* at 1624. However, the issue before this Court here is not whether "two statutes cannot be harmonized"

but instead whether Section 1 of the FAA itself manifests the clear intent of Congress to exempt all transportation workers from its purview. *Id.* at 1624. As this Court held in *Circuit City Stores, Inc.* the FAA does manifest just such a clear congressional intent to exempt "specific categories of workers" such as "seamen," "railroad employees," and "any other class of workers" engaged in transportation activities from its requirements. *Id.* at 114. Respondent is exempted from the FAA.

CONCLUSION

For the foregoing reasons, AAJ urges this Court to affirm the judgment of the U.S. Court of Appeals for the First Circuit.

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No. 17-340

IN THE

Supreme Court of the United States

NEW PRIME INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF THE AMICUS CURIAE*

American Trucking Associations, Inc. (ATA), is the national association of the trucking industry. Its direct membership includes approximately 1,800 trucking companies and in conjunction with 50 affiliated state trucking organizations, it represents over 30,000 motor carriers of every size, type, and class of motor carrier operation. The motor carriers represented by ATA haul a significant portion of the freight transported by truck in the United States and virtually all of them operate in interstate commerce among the States. ATA regularly represents the common interests of the trucking industry in courts throughout the nation, including this Court.

Many of ATA's members contract with owner-operators—independent businesspersons who own one or more trucks and lease them to motor carriers, and either operate them themselves or supply drivers to do so—to haul freight for them. And in many such arrangements, carriers and owner-operators enter into agreements to arbitrate disputes that may arise during the course of their business relationship. By agreeing to arbitrate, motor carriers and owner-operators alike avoid costly and protracted litigation, instead committing to rely on what both Congress and the courts have repeatedly endorsed as an efficient, fair, and less adversarial means of dispute resolution. And they do so in the expectation that the Federal

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* Both parties have consented to the filing of this brief. See Rule 37.2(a). Pursuant to Rule 37.6, amicus states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than amicus, its members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

Arbitration Act (FAA) will ensure that those commitments are honored. Because the decision below renders those arbitration agreements unenforceable under the FAA, ATA and its members have a strong interest in the outcome of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has repeatedly explained that "[t]he overarching purpose of the FAA ... is to ensure the enforcement of arbitration agreements according to their terms." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 334 (2011). Section 1 of the FAA, however, exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. 1. That exception means that if motor carriers and their truck driver *employees* include an agreement to arbitrate disputes *in their employment contracts*, they cannot expect those agreements to be enforced under the FAA. See *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 119 (2001) ("Section 1 exempts from the FAA only contracts of employment of transportation workers.").

Nevertheless, the FAA plays an important role in other contractual relationships regularly entered into in the trucking industry. In particular, many motor carriers frequently contract with independent businesses to haul freight on their behalf. Often, motor carriers and their independent contractors will agree to arbitrate any disputes that arise between them (including, in some cases, the question whether a given dispute is arbitrable), with the expectation that the FAA will require them to honor those agreements. The decision below upends that expectation.

This case presents two questions, the First Circuit's answer to each of which greatly diminishes the ability of the trucking industry—carriers and operators alike—to take advantage of the Congressional policy favoring arbitration of disputes.

The First Circuit's holding that applicability of the Section 1 exemption is always a question for the court, even when the parties expressly delegate questions of arbitrability to the arbitrator, J.A. 168, would effectively nullify the advantages of arbitration in misclassification disputes—*i.e.*, disputes that turn on whether a given owner-operator is properly classified as an employee or an independent contractor—because in such cases the court's resolution of the gateway question is "so bound up" with the merits of the dispute as to constitute "the entire ball game." *Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 87 (2010) (Breyer, J., dissenting). Such a result is incompatible with the strong "federal policy favoring arbitration," *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

But the First Circuit went much further, holding that *even if* the relationship between an owner-operator and a motor carrier is that of a bona fide independent contractor, the Section 1 exemption for transportation-worker "contracts of employment" nevertheless applies. J.A. 185. This sweeping, idiosyncratic holding, if affirmed, would mean that owner-operators and carriers who agree to arbitrate disputes could *never* expect those agreements to be enforced under the FAA—despite the substantial benefits of arbitration to both parties, and their potential to keep down the costs of shipping the materials and goods that are the lifeblood of the national economy. This Court should reverse, and

correct the First Circuit's serious blow to the trucking industry's opportunities to avail itself of the advantages of arbitration under the FAA.

ARGUMENT

I. The Business Relationships Between Motor Carriers and Independent Owner-Operators Are Crucial to the Trucking Industry.

A. In the trucking industry, the use of "owner-operators"—independent businesspersons who contract their services and lease their motor vehicle equipment to trucking companies pursuant to 49 U.S.C. 14102 and related regulations set forth at 49 C.F.R. § 376—is widespread and economically crucial. Their role in trucking operations has a history essentially as long as the industry itself. *See* Ex Parte No. MC 43 (Sub-No. 12), *Leasing Rules Modifications*, 47 Fed. Reg. 53858, 53860 (Nov. 30, 1982) ("Prior to the Motor Carrier Act of 1935, motor carriers regularly performed authorized operations in non-owned vehicles. To a large extent, ownership of these vehicles was vested in the persons who drove them, commonly referred to as owner-operators."). More than sixty years ago, this Court noted the trucking industry's extensive use of leased equipment and drivers supplied by owner-operators. *Am. Trucking Ass'ns, Inc.* v. *United States*, 344 U.S. 298, 303 (1953) ("Carriers ... have increasingly turned to owner-operator truckers to satisfy their need for equipment as their service demands.").

Accurate, recent estimates of the number of independent owner-operators are difficult to obtain, but there is no question that they constitute a large segment of the industry. The Owner-Operator Independent Drivers Association—the trade

association representing independent owner-operators and professional drivers—boasts over 160,000 members operating more than 300,000 trucks in the U.S. and Canada. *See* OOIDA: Who We Are, http://www.ooida.com/WhoWeAre. The Census Bureau's 2002 Vehicle Inventory and Use Survey—the most recent comprehensive inventory of trucks nationwide—counted over 545,000 trucks primarily operated by owner-operators. U.S. Census Bureau, *2002 Vehicle Inventory and Use Survey* 15, 39 (Dec. 2004), *available at* http://www.census.gov/prod/ec02/ec02tv-us.pdf. These independent contractors play a crucial role not just in long-haul over-the-road trucking operations, but in every sector of the trucking industry, from moving shipping containers from ports to nearby distribution centers, to nationwide express package delivery.

For trucking companies, independent contractors provide a number of advantages. Independent owner-operators often are mature, experienced drivers, with proven safety records, and highly motivated. The availability of such owner-operators and their equipment enables carriers to save on equipment and capital costs, and provides the flexibility necessary to meet fluctuations in demand for trucking services. As the Court has recognized,

> [d]emand for a motor carrier's services may fluctuate seasonally or day by day. Keeping expensive equipment operating at capacity, and avoiding the waste of resources attendant upon empty backruns and idleness, are necessary and continuing objectives. It is natural, therefore, that a carrier that finds itself short of equipment necessary to meet an immediate demand will seek the use of a vehicle not then

> required by another carrier for its operations, and the latter will be pleased to accommodate. Each is thereby advantaged.

Transamerican Freight Lines, Inc. v. *Brada Miller Freight Sys.*, 423 U.S. 28, 35 (1975). Contracting with independent businesses to supply capacity is, in short, critical to the ability of motor carriers to remain nimble and competitive in the face of inevitable fluctuation in demand for hauling freight.

B. Independent contracting provides significant advantages to owner-operators as well. By successfully and skillfully managing operations, an independent contractor can grow his or her own business, whether by productively performing services him or herself, or by hiring employees to provide additional services. *See, e.g.*, Philip J. Romero, *The Economic Benefits of Preserving Independent Contracting* 30 (Sept. 2011), *available at* http://www.cbrt.org/wp-content/uploads/2012/04/Final-Romero-Report.pdf. Owner-operators who drive their own trucks typically outearn similarly situated employee drivers by a significant margin: as one industry expert stated, "the average owner-operator fares better than company driver counterparts," with a net income of $51,912 compared to "about $40,000 per year for the same amount of work" by an employee driver. Rip Watson, *Owner-Operators Make More Income, Freight-Rate Gains, Industry Expert Says*, Transport Topics, Sept. 23, 2013, at 12.

But independent owner-operators have the opportunity to do far more than simply make more money by personally hauling freight. Because business start-up costs in the trucking industry are comparatively modest—consisting principally of the cost of a tractor and various licensing and insurance

fees—trucking provides independent contractors an affordable opportunity to start their own businesses. Entrepreneurial owner-operators can purchase additional trucks and trailers, and employ drivers and other staff to carry out and expand their business. Independent contracting in the trucking industry allows owner-operators to be their own bosses, and to nurture their own enterprises. In fact, some of today's largest trucking companies—the petitioner here among them—grew from a single-truck operation. *See, e.g.*, Pet. Br. 28; Company History: The C.R. England Story, http://www.crengland.com/company-history.

II. The Decision Below Undermines the Federal Policy Favoring Arbitration, by Depriving Motor Carriers and Independent Owner-Operators of the Benefits of Arbitration Under the FAA.

Petitioner explains in detail why the First Circuit erred in holding that the phrase "contracts of employment" in Section 1 encompasses agreements between motor carriers and independent owner-operators. Pet. Br. 16–29. If affirmed, that holding would broadly eliminate the ability of trucking businesses to rely on arbitration under the FAA.

A. Success in the trucking industry, for carriers and owner-operators alike, presents any number of challenges, with fierce competition resulting in low margins. Unsurprising, then, that carriers and owner-operators aggressively pursue measures that promote efficiency. Like any number of other businesses, trucking businesses frequently agree to arbitrate disputes that may arise between them in the course of their relationship. Motor carriers and independent contractors turn to arbitration because—as Congress

has repeatedly found—arbitration allows parties to avoid the "delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation of business disputes." Y2K Act of 1999, Pub. L. No. 106-37 § 2(a)(3)(B)(iv), 113 Stat. 185, 186; *see also* H.R. Rep. No. 68-96, at 2 (1924) ("the costliness and delays of litigation ... can be largely eliminated by agreements for arbitration"); H.R. Rep. No. 97-542, at 13 (1982) (arbitration is "cheaper and faster than litigation," has "simpler procedural and evidentiary rules," "minimizes hostility," and is "more flexible in regard to scheduling"). As this Court has put it, in arbitration, "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010).

The First Circuit's holding, if affirmed, would ensure that arbitration will be adopted less widely, if at all, in contracts between carriers and independent owner-operators. After all, if the parties to the agreement know that it can be unilaterally repudiated by either party when a dispute arises, they will have little incentive to choose arbitration in the first place. As a result, motor carriers will no longer be able to count on arbitration as a lower-cost, more efficient alternative to litigation as a means of resolving disputes with owner-operators.

B. But motor carriers are not the only losers under the First Circuit's decision: while the plaintiff in *this case* may have concluded that he would fare better in court than in arbitration, for owner-operators faced

with relatively small, individual disputes with a motor carrier, arbitration may well be the only realistic opportunity to vindicate their rights. As the Court has observed, "arbitration's advantages often would seem helpful to individuals ... who need a less expensive alternative to litigation." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995). Without recourse to arbitration, someone "who has only a small damages claim (who seeks, say, the value of only a defective refrigerator or television set)" is left "without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery." *Id.* at 281.

The same would be true of any number of inherently individualized disputes that regularly arise between motor carriers and owner-operators—say, a dispute in which an owner-operator believes the motor carrier has breached their contract by underpaying for a load, to the tune of a few thousand dollars. Such a claim (unless it was low enough to be resolved in small claims court) might be too small for an owner-operator to pursue in a potentially lengthy, expensive lawsuit, even if he or she is confident of ultimately prevailing. But such a dispute might very well be worth pursuing in arbitration, where the reduced procedural and evidentiary burdens mean a party can resolve a claim more efficiently and expeditiously than they could in court—depending on the circumstances, perhaps without the expense of a lawyer at all, "in this much less formal and intimidating forum." Theodore St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 792 (2008).[1]

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[1] In principle, owner-operators would be free to simply adhere to an arbitration agreement when they felt that they

The inevitable result of the First Circuit's approach to the Section 1 exemption, then, will be that any number of meritorious claims that owner-operators might have cost-effectively vindicated in arbitration will instead go unremedied.

C. This disincentive to arbitration is similarly a losing proposition for the shippers and consumers the trucking industry serves. Arbitration permits a business to resolve disputes more cheaply, and those "cost-saving benefits ... are reflected in a lower cost of doing business that in competition are passed along to customers." *Boomer* v. *AT&T Corp.*, 309 F.3d 404, 419 (7th Cir. 2002) (internal quotation marks and citation omitted); *see also* Stephen Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251, 254–255 (2006) (arbitration "lower[s] [businesses'] dispute-resolution costs," and this "benefit to business[] is also a benefit to consumers" because "whatever lowers costs to businesses tends over time to lower prices to consumers"). Given the pervasive role of trucking in delivering the goods on which the nation and its economy depend, this is, cumulatively, no small consideration. *See, e.g.*, American Trucking Associations, *American Trucking Trends* 5 (2017) (in

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could vindicate a particular dispute more readily in arbitration than in court, without recourse to enforcement under the FAA. As a practical matter, however, if carriers and contractors cannot count on their arbitration agreements being enforced *ex ante*, they will be unlikely to enter into them in the first place. And even if they did, what's sauce for the goose is sauce for the gander: the First Circuit's holding would allow motor carriers as well as owner-operators to walk away from their arbitration agreements when a dispute arises, if they saw a tactical advantage in doing so.

2016, transportation by truck represented 79.8% of the nation's primary shipment freight bill, and 70.6% of domestic tonnage).

D. In his opposition to the petition for certiorari, respondent suggests that the First Circuit's expansive construction of the Section 1 exemption will not greatly diminish the use of arbitration in the trucking industry, because "[i]t merely means that state law—rather than federal—applies to their enforcement." Opp. 28. But that assertion ignores the fact that the FAA expresses a strong *federal* policy favoring arbitration—and that especially for an industry whose business is to constantly cross state lines, federal law is the only reliable option.

To be sure, some courts have enforced arbitration agreements between carriers and owner-operators under state law even when they were, in the court's view, exempt under Section 1 of the FAA. *See, e.g.*, *Palcko* v. *Airborne Express, Inc.*, 372 F.3d 588, 596 (3d Cir. 2004) (enforcing arbitration agreement in transportation employment contract under Washington law); *Valdes* v. *Swift Transp. Co.*, 292 F. Supp. 2d 524, 530 (2003) (enforcing arbitration agreement in transportation employment contract under New York law). Other courts, however, have declined to enforce such agreements under state law. *See, e.g.*, *Owner-Operator Indep. Drivers Ass'n* v. *C.R. England, Inc.*, 325 F. Supp. 2d 1252, 1258–59 (D. Utah 2004) (refusing to enforce arbitration agreement in transportation employment contract under Utah law). Thus, neither carriers nor owner-operators could be confident, *ex ante*, that their arbitration agreements will be enforced if their only recourse is to state law.

Moreover, the FAA "creates a body of federal substantive law establishing and regulating the duty

to honor an agreement to arbitration." *Mercury Constr.*, 460 U.S. at 25 n.32. The substance of state arbitration law, by contrast, will vary from jurisdiction to jurisdiction. Thus, even where state arbitration law might not exempt an arbitration agreement altogether simply on the ground that it was a transportation worker "contract of employment," carriers and owner-operators still could not rely on the well-developed *federal* law of arbitration to be confident that the agreement will be enforced according to its terms. *See, e.g., Garrido* v. *Air Liquide Industrial U.S. LP*, 194 Cal. Rptr. 3d 297, 308 (Cal. Ct. App. 2015) (holding that California Arbitration Act applied to agreement that was exempt under Section 1 of FAA, but refusing to enforce because agreement did not provide for class arbitration).

In short, particularly in an industry whose constant movement of goods and people from state to state provides limitless opportunities for forum shopping, the theoretical prospect of enforcing an arbitration agreement under state law amounts is for all practical purposes illusory. If carriers and owner-operators cannot count on the uniformity of the FAA, they will have little incentive to enter into arbitration agreements in the tenuous hope that it will be enforced according to its terms under the law of whatever state a particular dispute happens to land in.

CONCLUSION

The judgment of the Court of Appeals for the First Circuit should be reversed.

Respectfully submitted.

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No. 17-340

IN THE

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Federal Arbitration Act's exemption for certain "contracts of employment" encompasses independent contractor agreements.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, files briefs in the courts, and produces the *Cato Supreme Court Review*. This case is important to Cato because it concerns the freedom of individuals and businesses to structure their economic relations through contractual agreement.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 1 of the Federal Arbitration Act excludes from the Act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The court below rejected the view that the term "contracts of employment" includes only (literally) "contracts of employment"—that is, con-

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[1] Pursuant to Rule 37.3(a), letters consenting to the filing of this brief are filed with the clerk. In accordance with Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

tracts establishing traditional employer–employee relationships—and instead interpreted it to encompass any and all "agreements to perform work," including "agreements of independent contractors to perform work." Pet. App. 25a, 27a.

The Congress that enacted the FAA in 1925 intended no such thing. At that time, as today, statutory terms such as "employment" were universally understood to refer to agreements establishing traditional employer–employee relationships according to the principles of common law that evolved over the centuries. Congress knew that because it enacted (and would go on to enact) a series of statutes relying on that common law understanding of terms such as "employment." Congress also knew and expected that the federal courts would interpret its handiwork in that manner because that is what the courts had repeatedly said that they would do, thereby providing Congress a foundational principle upon which to legislate.

That words such as "employment" referred specifically to traditional employer–employee relationships was not an obscure principle. To the contrary, it was reflected in practically every state workmen's compensation scheme enacted in early decades of the Twentieth Century. Some states defined terms such as "employment," "employer," and "employee" expressly by reference to common law concepts, while others left them undefined so as to achieve the same result. Both kinds of statutes addressed liability concerning independent contractors and their workers

separately, because legislators knew that general provisions addressing traditional employees would *never* be understood to reach independent contractors. The common understanding of what these terms meant was that clear.

That Congress meant what it said in the FAA is not just a matter of presumption, but of fact. As a historical matter, Congress crafted the Section 1 exemption to avoid unsettling "established or developing statutory dispute resolution schemes covering specific workers." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 (2001). Those schemes applied only to employees, not to independent contractors. The statutory history reflects that those employees—and not some broader class of workers—were Congress's focus in drafting what became the Section 1 exemption.

Language and history both confirm that Congress used the term "contracts of employment" for a reason and that it meant what it said, targeting employees, not anyone else. Accordingly, the decision of the court below should be reversed.

ARGUMENT

I. At the Time of the FAA's Enactment, "Contracts of Employment" Referred to Traditional Employer–Employee Relationships, Not Independent Contractor Arrangements

In 1925, as today, "contracts of employment" referred to agreements establishing traditional employer–employee relationships. The courts presumed as much in interpreting federal and state statutes. Congress and state legislatures presumed as much in enacting statutes—both when they relied on that presumption in statutes that do not expressly define terms such as "employment" but unmistakably intended that precise meaning, and when they went beyond such words so as to also reach independent contractor agreements. Courts embraced the same distinction in applying the common law, as did the legal dictionaries and learned treatises of the time. On this point, the FAA's text is plain: only certain agreements establishing traditional employer–employee relationships are exempt from the FAA's scope.

A. The Congress that Enacted the FAA Was Well Aware that Courts Construe Words Such as "Employment" To Refer Only to Traditional Employer–Employee Relationships

"Where Congress uses terms that have accumulated settled meaning under...the common law, a

court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981). Statutory terms such as "employment" have such a well-established meaning, referring to traditional employer–employee relationships. This Court has recognized as much since at least 1915.

Robinson v. Baltimore & Ohio R. Co. required the Court to interpret the terms "employee" and "employed" as used in the Federal Employer's Liability Act, enacted in 1908. 237 U.S. 84 (1915). A provision of that statute rendered void contractual provisions releasing a rail carrier from certain liabilities to "employees" of the carrier who were "employed" by it. *Id.* at 91 (quoting statute). After a Pullman car porter hired by the Pullman Company was injured in a collision, he sued the train's carrier, which in turn cited the liability release in his contract. *Id.* Whether the Act applied therefore turned on whether the porter was "employed" by the carrier under FELA. The statute lacking any definition of the relevant terms, the Court presumed that "Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee." *Id.* at 94. And the porter's claim against the carrier failed because it was Pullman, not the carrier, that "selected [the porters], defined their duties, fixed and paid their wages, directed and supervised the performance of their tasks, and placed and removed them at its

pleasure"—the hallmarks of a traditional employer–employee relationship. *Id.* at 93.

The Court considered itself bound to respect Congress's decision not to extend FELA's protections beyond such employees. After all, Congress knew well "that there were on interstate trains persons engaged in various services for other masters," but it "did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the Act." *Id.* at 94.

Likewise, in *Hull v. Philadelphia & Reading R. Co.*, the Court recognized that, between two rail carriers potentially liable under FELA for the death of a brakeman, liability was properly placed on the one with whom he had "the conventional relation of employer and employee." 252 U.S. 475, 479 (1920). And in *Linstead v. Chesapeake & O. Ry. Co.*, the Court again looked to traditional indicia of employment—payment rates, work rules, immediate supervision, control, etc.—to determine which of two carriers was liable for a conductor's death. 276 U.S. 28, 33–34 (1928) (applying common law approach of *Standard Oil Co. v. Anderson*, 212 U.S. 215, 228–29 (1909)); *see also Baker v. Texas & P. Ry. Co.*, 359 U.S. 227, 228–29 (1959) (per curiam) (same, and referring to sections of the Restatement (Second) of Agency dealing with the borrowed-servant doctrine and the general master–servant relationship); *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 323–31 (1974) (same).

The rule that statutory terms such as "employment" refer to traditional employer–employee relationships is not limited to FELA. *Community for Creative Non-Violence v. Reid*, for example, involved the Copyright Act's "work for hire" provision governing "'work[s] prepared by an employee within the scope of his or her employment.'" 490 U.S. 730, 732 (1989) (quoting statute). As the Court unanimously recognized, "[i]n the past, when Congress has used the term 'employee' without defining it..., Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Id.* at 739–40 (citing cases). Under that rule, it explained, terms such as "employee," "employer," and "employment" refer to "the conventional relation of employer and employee." *Id.* at 740 (quotation marks omitted). Applying that rule, the Court held that the Copyright Act distinguished between works prepared by employees and those prepared by independent contractors. *Id.* at 751.

Similarly, *Nationwide Mutual Insurance Co. v. Darden* applied what it called the "well established principle" that "the meaning of 'employee' where the statute containing the term does not helpfully define it" is "to describe the conventional master-servant relationship as understood by common-law agency doctrine." 503 U.S. 318, 322–23 (1992) (quotation marks omitted). Thus, it held, the definition of "employee" in the Employee Retirement Income Security Act as "any individual employed by an employer" could only be interpreted as referring to the tradi-

tional "master-servant relationship." *Id.* at 323–24; *see also Clackamas Gastroenterology Assocs., P. C. v. Wells*, 538 U.S. 440, 444–45 (2003) (same interpretative approach and result with respect to Americans with Disabilities Act's similarly "circular" definition of "employee").

Indeed, the Court remarked that when it had, in two prior cases, relied on statutory context to adopt broader interpretations of terms like "employee," Congress had "amended the statute so construed to demonstrate that the usual common-law principles were the keys to meaning." *Darden*, 503 U.S. at 324–25 (citing *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 120–29 (1944); *United States v. Silk*, 331 U.S. 704, 713 (1947)); *see also* H.R. Rep. No. 80-245, at 18 (1947) (distinguishing "employees," who "work for wages or salaries under direct supervision," from "independent contractors," who "undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for good, materials, and labor and what they receive for the end result, that is, upon profits"). On that basis, it announced the "abandonment" of amorphous consideration of statutory context to broaden the reach of terms such as "employee." *Id.* at 325.

The FAA lacks any indication that Congress intended to depart from the well-established meaning of the term "employment." Accordingly, there is no possible basis to depart from the longstanding rule,

predating enactment of the FAA, that Congress's use of that term refers only to traditional employer–employee relationships.

B. Contemporaneous State Statutes Used Terms Such as "Employment" To Refer Only to "Employees," Not Independent Contractors

Like their federal counterparts in Congress, state legislators at the time were keenly aware that terms such as "employment" referred only to traditional employer–employee relationships, not independent contractor arrangements. And when they sought to regulate independent contractor arrangements, they used additional language to make that intention clear.

For example, when California enacted its workmen's compensation scheme in 1913, it used the terms "employer" and "employee" in the ordinary sense. The statute defined "employer" as any business or person who has an individual under a contract for hire and "employee" as "[e]very person in the service of an employer." 1913 Cal. Stat. ch. 176, §§ 13, 14, *reprinted in* U.S. Bureau of Labor, Workmen's Compensation Laws of the United States and Foreign Countries, Bulletin No. 126, at 187–215 (1913) [hereinafter BLS Bulletin No. 126]. Context makes clear that neither term was considered to reach independent contractor arrangements: an entirely separate provision of the state comprehensively addresses liability for situations involving "intermediate contractors." *Id.* at ch. 176, § 30. When California legislators sought to regulate independent

contractor arrangements, they knew well that terms like "employee" would be insufficient and that additional language specifically addressing such arrangements was required.

Similarly, Illinois's 1913 workmen's compensation scheme defined an "employer" as any business that has any person under a "contract for hire" and "employee" as "[e]very person in the service of another under any contract of hire." 1913 Ill. Laws p.335, §§ 4, 5, *reprinted in* BLS Bulletin No. 126 at 225–38. Like California, Illinois specifically addressed independent contractor liability in a separate provision, carefully tailoring such liability to fit its detailed compensation-funding scheme. *Id.* at p.335, § 31. Again, this shows that even seemingly broad definitions of terms like "employee" were understood not to encompass independent contractors.

Likewise, Kansas's 1911 workmen's compensation law too relied on the background common law to give life to its circular definitions of "employer" as "any person or body of persons corporate or unincorporate" and "workman" as "any person who has entered into the employment of or works under contract of service or apprenticeship with an employer." 1911 Kan. Sess. Laws ch. 218, § 9(h), (i) *reprinted in* U.S. Bureau of Labor, Bulletin of the United States Bureau of Labor, Bulletin No. 92, at 117–24 (1911) [hereinafter BLS Bulletin No. 92]. This law also addressed independent contractor liability in a separate provision that makes the principal liable for a contractor's employees as if they were his own. *Id.* at ch. 218, § 4(a). Of course, that provision would be

superfluous if terms like "employer" and "workman" were understood to encompass independent contractor arrangements.

The same holds true for New York's workmen's compensation scheme enacted in 1910. Not only did it define terms like employer specifically by reference to common law concepts like "authority to direct, control, and command," but it also separately imposed liability on those hiring independent contractors. 1910 N.Y. Laws ch. 352, § 1, *reprinted in* U.S. Bureau of Labor, Bulletin of the United States Bureau of Labor, Bulletin No. 90, at 709–12 (1910) [hereinafter BLS Bulletin No. 90].

Nebraska, meanwhile, adopted almost the opposite policy in its 1913 workmen's compensation statute, imposing liability on the "principal employer" for injuries sustained by employees employed by "contractors" only when the contract was an attempt to circumvent the compensation law. 1913 Neb. Laws ch. 198, pt. 2, §§ 14, 15, *reprinted in* BLS Bulletin No. 126 at 302–13. As in New York, however, the Nebraska Legislature was aware that it had to address the issue of liability for independent contractors expressly, and could not rely on general provisions addressing employers and employees. *Id.* Minnesota's 1913 workmen's compensation law took much the same approach as Nebraska's, in terms of both policy and statutory drafting. 1913 Minn. Laws ch. 467, pt. 2, § 35, *reprinted in* BLS Bulletin No. 126 at 278–301.

A number of states followed Congress's approach in the FAA, FELA, and other statutes of leaving

statutory terms like "employment" entirely undefined and yet indicated, through context, that they understood those terms to refer to traditional employer–employee relations.

For example, Connecticut's 1913 workmen's compensation law applied to any "mutual relation of employer and employee," without defining either term. 1913 Conn. Acts ch. 138, pt. B, § 1, *reprinted in* BLS Bulletin No. 126 at 215–225. But it did include a separate provision imposing liability on the "principal employer" for injuries sustained by employees directly employed by "contractors," thereby recognizing that such individuals would not fall within the ambit of the term "employee." *Id.* at ch. 138, pt. B, § 5.

Massachusetts's 1911 worker's compensation scheme followed the same general pattern, leaving the terms "employee" and "employer" undefined, while imposing liability on the principal employer for any "independent contractor" and any employees of the contractor. 1911 Mass. Acts ch. 751, § 17, *reprinted in* BLS Bulletin No. 126 at 266–77.

New York did the same in its compensation scheme for workers in certain dangerous professions, specifically imposing liability for independent contractors. 1910 N.Y. Laws ch. 674, §§ 215–16, 219(g) *reprinted in* BLS Bulletin No. 90 at 713–14.

Similarly, in 1911, when the New Jersey legislature created a cause of action for injuries to employees "arising out of and in the course of [their] employment" by an "employer," and eliminated the

common law "fellow servant" defense, it included an "independent contractor" provision. That provision imposed liability on the principal as if it were the direct employer for certain kinds of liability. 1911 N.J. Laws ch. 95, §§ 1.1–1.3, *reprinted in* BLS Bulletin No. 92 at 128–32.

Finally, Rhode Island's Workmen's Compensation Act neither defined "employee" nor addressed independent contractor arrangements. R.I. Gen. Laws §§ 1205–94 (1923). The Supreme Court of Rhode Island recognized that the term "employee" referred only to traditional employer–employee relationships. *Henry v. Mondillo*, 49 R.I. 261, 142 A. 230, 232 (1928). Accordingly, "[o]ne who contracts with another to do a specific piece of work for him, and who furnishes and has the absolute control of his assistants, and who executes the work entirely in accord with his own ideas, or with a plan previously given him by the person for whom the work is done, without being subject to the latter's orders in respect to the details of the work, with absolute control thereof, is not a servant of his employer, but is an independent contractor" and therefore outside of the Act's protections. *Id.*

In sum, contemporaneous state laws embrace the same understanding as federal law that statutory terms such as "employer," "employee," and "employment" do not encompass independent contractor arrangements. When legislatures sought to regulate such arrangements, they therefore did so expressly.

C. Courts Applying Common Law Consistently Limited Employers' Obligations to Employees, Excluding Independent Contractors

The longstanding interpretative rule expressed by this Court in *Robinson* and by so many state courts and legislatures reflects even more longstanding principles of common law distinguishing between employees and independent contractors in determining a principal's obligations.

Common law prior to the FAA's enactment consistently regarded "independent contractors" and "employees" as mutually exclusive categories. "[T]he distinction between employees and independent contractors has deep roots in our legal tradition." *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721–22 (1996); *see also Pittsburgh Valve Foundry & Const. Co. v. Gallagher*, 32 F.2d 436, 438 (6th Cir. 1929) (noting that the "relationship of master and servant [i.e., employee] ...negatives the relationship of independent contractor"). The issue often arose because the common law cabined *respondeat superior* liability for negligence torts to a principal's employees, excluding independent contractors and their employees. *See, e.g., Atl. Transp. Co. v. Coneys*, 82 F. 177, 178 (2d Cir. 1897) ("The fact of a distinction between the liability of an employer for an injury caused by the negligence of his employee or his servant, and the liability of an owner for an injury caused by the negligence of an independent contractor...[was] distinctly understood.").

By 1925, virtually every jurisdiction in the United States had adopted the common law control test to determine into which of the two mutually exclusive categories a tortfeasor fell for the purpose of determining whether the principal could be subject to vicarious liability. That test generally turned on whether the principal exercised sufficient control over the means of performance of work such that the tortfeasor was its "servant." Summarizing the extant case law, this Court explained that, "[t]o determine whether a given case falls within the one class or the other [a court] must...ascertain[] who has the power to control and direct the servants in the performance of their work." *Standard Oil Co.*, 212 U.S. at 221–22; *see also id.* at 225 (discussing cases from a variety of jurisdictions).

And it is that approach that this Court recognized Congress intended to apply when it used statutory terms like "employment" without further elaboration. *Linstead*, 276 U.S. at 33–34. That was the well-recognized and settled meaning that Congress must be presumed to mean to incorporate when it uses such terms.

D. Contemporaneous Dictionaries and Treatises Reflect that Legal Language Distinguished Between "Employees" and "Independent Contractors," Just as We Do Today

Mirroring contemporary usage and understanding, legal dictionaries and secondary sources around the time of the FAA's enactment likewise recognized

the distinction between an employee and an independent contractor.

The definition of "employ" contained in the 1910 edition of *Black's Law Dictionary* specifically states that, "when used in respect to a servant or hired laborer, the term is equivalent to hiring, which implies a request and a contract for a compensation, *and has but this one meaning* when used in the ordinary course and business of life." *Employ*, Black's Law Dictionary (2d ed. 1910) (emphasis added). Building on that approach, the 1933 and 1955 editions both explain that "'[e]mployee' must be distinguished from 'independent contractor,' 'officer,' 'vice-principal,' 'agent,' etc. The term is ofter specially defined by statutes; and whether one is an employee or not will depend upon particular facts and circumstances even though the relation of master and servant, or some other form of contractual relation does or does not exist." *Employee*, Black's Law Dictionary (3d ed. 1933) (collecting state law cases); *accord Employee*, Black's Law Dictionary (4th ed. 1955).

Consistently, legal dictionaries' definitions of independent contractor universally assume a background understanding of the control test by making express reference to the lack of a right of control over the means of the work. *Independent Contractor*, Black's Law Dictionary (2d ed. 1910) ("one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work; one who contracts to perform the work at his own risk and cost, the

workmen being his servants, and he, and not the person with whom he contracts, being liable for their fault or misconduct"); *Independent Contractor*, 2 Bouvier's Law Dictionary and Concise Encyclopedia (Rawles rev. ed. 1914) (a person who, "exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work," that the term "denote[s] one who has the right to select, employ, and control the action of the workmen," and that "[i]n the cases of an independent contract, the employer is not responsible....[a] like rule governs the question of the liability of the employer and the contractor for the negligence and torts of the sub-contractor or his servants," and further noting at 1535 that "independent contractors" provide "employment" for "employé[s]," and moreover noting extensive Anglo-American case law at 1534–36 distinguishing between independent contractor and employee liability at common law); *accord Independent Contractor* Bouvier's Law Dictionary: Baldwin's Student's Edition (William Edward Baldwin ed. 1934); *Independent Contractor*, Ballantine's Law Dictionary (1916) (defining the term as one "who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work").

The same is true of contemporaneous treatises examining the term "independent contractor." *E.g.*, Theophilus J. Moll, A Treatise on the Law of Independent Contractors & Employers' Liability (1910)

(an independent contractor is one who has "independence of control in employing workmen and selecting the means of doing the work").

In short, the relevant legal authorities reflect the same distinction as the common law, statutory law, and courts' decisions interpreting statutes, consistently holding that employees and independent contractors are by default separate, mutually independent categories. And that holds true to this day. *E.g.*, *Independent Contractor* Black's Law Dictionary (9th ed. 2009) (noting that an independent contractor is "unlike an employee").

II. Statutory History Confirms that the FAA's "Contract of Employment" Exemption Is Limited To Traditional Employer–Employee Relationships

While it would be sufficient in this case for this Court to apply the longstanding rule that terms such as "employment" refer only to traditional employer–employee relationships, the historical context in which the FAA was enacted confirms that Congress actually did intend to so limit the scope of the Section 1 exemption. In particular, Congress sought to exclude from the FAA's mandate employment agreements that were or would soon be subject to specialized dispute-resolution procedures under federal law that might conflict with the FAA's generally applicable arbitration requirement. This historical context explains why Congress structured the Section 1 exemption as it did, and the statutory history demonstrates how specifically Congress relied upon

the traditional, common law meaning of the term "employment" to cover a precise class of employees whom it sought to exempt from the FAA's reach.

A. The Historical Context in Which the FAA Was Enacted Confirms that the Exemption's Scope Is Limited to Certain Employees

In *Circuit City*, this Court correctly recognized that Section 1 of the FAA exempts "contracts of employment" only for transportation employees rather than other employment sectors. *Circuit City*, 532 U.S. at 119. Arriving at that conclusion required acknowledgement of Section 1's specific enumeration of "seamen" and "railroad employees" and the rule of *ejusdem generis*. *Id.* at 114. That is, the general phrase, "any other class of workers engaged in...interstate commerce" was controlled by the discrete categories of employees that proceeded it. *Id.* at 115. This made sense, both as a matter of historical context and legislative craft, because in the post-World War I labor and employment environment, it was "rational for Congress to ensure that workers in general would be covered by the provisions of the FAA, while reserving for itself more specific legislation for those engaged in transportation." *Id.* at 121. Namely, it was "reasonable to assume that Congress excluded 'seamen' and railroad workers from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers." *Id.*

It follows directly what Congress meant by "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," according to the same rules of construction applied in *Circuit City*, controls the scope of those transportation workers excluded from FAA coverage under the Section 1 exemption. Crucially, the statutory dispute-resolution schemes discussed in *Circuit City*, which were either established or in the drafting stage at the time of the FAA's enactment, applied only to employees—not independent contractors.

This Court has recognized as much. As early as 1930, this Court construed the Railway Labor Act of 1926, Pub. L. 69-257, 44 Stat. 577 (May 20, 1926), as an employee-protection statute governing the right of employees under a collective bargaining agreement to choose their representative: "[t]he statute is not aimed at this right of the employers, but at the interference with the right of employees to have representatives of their choosing. As the carriers subject to the Act have no constitutional right to interfere with the freedom of the employees in making their selections, they cannot complain of the statute on constitutional grounds." *Texas & New Orleans R. Co. v. Brotherhood of Ry. Clerks*, 281 U.S. 548, 571 (1930).

The RLA was an answer to the flawed Transportation Act of 1920, which failed to adequately solve the labor problems affecting management and employees within the rail industry. The situation leading to the RLA—at the same time Congress drafted

and passed the FAA—was one in which railroad "'employees absolutely refuse to appear before the labor board.... [I]ts authority is not recognized or respected by the employees and by a number of important railroads.'" *Id.* at 563 (quoting S. Rep. No. 222 (1926)). Indeed, the shortcomings of the Transportation Act of 1920 centered on the fact that labor board decisions—involving railroad employees—were not enforceable.

Those shortcomings led to the RLA, which was "the product of a negotiation between employers and employees." Railroad Labor Disputes: Hearings on H.R. 7180 Before the House Comm. on Interstate and Foreign Commerce, 69th Cong., 1st Sess., 198 (1926) (statement of D.R. Richberg). Both the Republican and Democratic party platforms called for change to the Transportation Act in 1924,[2] which is the same year that Congress introduced the Howell-Barkley bill that launched the negotiations over the RLA.[3] Against that backdrop, representatives of the rail employers "and all the employees in one industry conferred for several months of the purpose of creating by agreement a machinery for the peaceful and prompt adjustment of both major and minor disagreements that might impair the efficiency of operations or interrupt the service they render to the community." *Id.* That is, everything that the RLA

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[2] 1 National Party Platforms 246, 263 (Donald B. Johnson ed., Univ. of Ill. Press, rev. ed. 1978).

[3] Douglas W. Hall & Michael L. Winston, The Railway Labor Act (4th ed. 2016).

concerned as Congress debated it and eventually passed it was directed toward railroad employees covered by collective bargaining agreements. The RLA does not and cannot apply to non-employee independent contractors. That much is explained at the outset of the statutory language:

> The purposes of the chapter are: ... (2) to forbid any limitation upon freedom of association among *employees* or any denial, as a condition of employment or otherwise, of the right of *employees* to join a labor organization; ... (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions.

45 U.S.C. § 151a (emphasis added).

Not only that, but the RLA defines "employee" using the common law approach to the term—limiting its coverage to those persons in service of the carrier "(subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official." 44 Stat. 577, 577, at § 1.

So when Congress excluded "railroad employees" from Section 1 of the FAA because of "the developing statutory dispute resolutions schemes covering spe-

cific workers," it did so with the knowledge that the workers covered by the developing RLA scheme were by definition employees and not independent contractors. *See Circuit City*, 532 U.S. at 121.

The same is true for seamen. The Jones Act, enacted in 1920 to provide a cause of action for injured seamen, borrowed the meaning of employee from the Federal Employers' Liability Act, which was limited to railroad "employee[s]." 45 U.S.C. § 51. Even before the FAA was passed, this Court had already settled that "employee" and "employed" as used in FELA were "intended to described the conventional relation of employer and employee." *Robinson*, 237 U.S. at 95. That is precisely the framework that the Jones Act built upon when it provided that "[a] seaman injured in the course of employment...may elect to bring a civil action at law...against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section." 46 U.S.C. § 30104. Before the Jones Act, the Shipping Commissioners Act of 1872 protected a "person seeking employment as a seaman" from unlawful employment fees. 17 Stat. 262, 264 (June 7, 1872). Once again, when Congress excluded seamen from Section 1 of the FAA, the exemption referenced seamen as employees—not independent contractors—based on the established statutory dispute resolution framework in place in 1925.

Guided by this Court's *ejusdem generis* rule of construction applied in *Circuit City*, Sections 1's exemp-

tion can only extend to transportation *employees*, as opposed to independent contractors. After all, those were the only types of workers covered by "established or developing statutory dispute resolution schemes" that Congress did not want to unsettle in passing the FAA. *See Circuit City*, 532 U.S. at 121.

B. The Statutory History of the FAA Confirms the Exemption's Limited Scope

The statutory history of the Section 1 exemption confirms what the historical context suggests: that Congress sought to exclude specifically classes of employees—and not independent contractors—from FAA coverage and used the well-understood term "contracts of employment" to do so.

What became the FAA was first introduced in 1922 by Senator Thomas Sterling and Congressman Ogden Mills. Comm. on Commerce, Trade, and Commercial Law, *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153, 153 (1925); Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 14 (1923) (letter of Secretary of Commerce Herbert Hoover) [hereinafter 1923 Hearing]. Originally drafted by the American Bar Associ-

ation, the bill did not include an exemption for "contracts of employment."[4]

The International Seamen's Union of America, through its President Andrew Furuseth, and the American Federation of Labor, promptly objected. They were "concern[ed] that the legislation might authorize federal judicial enforcement of arbitration clauses" in seamen's employment contracts.[5] *See Circuit City*, 532 U.S. at 127 & nn.5–8 (Stevens, J., dissenting); Proceedings of the 26th Annual Convention of the International Seamen's Union of America 204 (1923) (statement of Andrew Furuseth, presi-

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[4] 1923 Hearing at 14 (letter of Secretary of Commerce Herbert Hoover).

[5] Furuseth had secured the passage of the Seamen's Act of 1915, 38 Stat. 1164 (Mar. 4, 1915). The Act provided seamen with certain rights he believed would be taken away by a statute making agreements to arbitrate enforceable. Seamen were required by statute to sign individual contracts of employment termed "shipping articles." 46 U.S.C. § 10302 (1994). These "articles" were individual written contracts of employment requiring the seamen to work on a specified voyage and the employer to provide certain benefits. Furuseth stated that there had arisen a practice of including in "articles" something not required by statute: an agreement to arbitrate disputes before a shipping commissioner or, if in a foreign port, before a United States consul. Such an arbitration, in Furuseth's opinion, would constitute "compulsory labor" because an arbitrator might require a seaman to remain on or return to a ship even though under the Seamen's Act he would have the right to leave, forfeiting only pay. He was therefore against enforcement of agreements to arbitrate. *See* Proceedings of the 26th Annual Convention of the International Seamen's Union of America at 83-84; *id.* at App. I, 203–05 (1923).

dent of the International Seamen's Union); *id.* at 203 (noting that the then-proposed FAA was a "compulsory labor" and "forced or involuntary labor" bill); Proceedings of the Forty-Fifth Annual Convention of the American Federation of Labor 52 (1925); *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 467 n.2 (1957) (Frankfurter, J., dissenting).

Accordingly, in hearings on the bill in 1923, the Senate Judiciary Committee and the American Bar Association explained that the bill was not intended to affect contracts of employment of seamen or the railway industry. The main sponsor of the bill, Senator Sterling, asked the representative of the ABA directly about the "objection raised against it" by the Seamen's Union. Speaking for the American Bar Association at the hearings, "the chairman [of the ABA drafting committee] at the time this matter was formulated," W. H. H. Piatt, noted the objection that the FAA would "compel[] arbitration of the matters of agreement between the stevedores and their employers," 1923 Hearing at 9, and retorted that "[i]t was not the intention of this bill to have any such effect as that. It was not the intention of this bill to make an industrial arbitration in any sense." *Id.* Accordingly, Mr. Piatt offered language for an amendment to clarify that point: "'but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce.'" *Id.*; *see also id.* at 10 (statement of Senator Sterling) (noting the "suggested amendment" by Mr. Piatt in response to an inquiry about railroad construction contracts).

Then-Secretary of Commerce Herbert Hoover submitted a letter for the record in those hearings, stating that "[i]f objection appears to the inclusion of workers' contracts in the law's scheme, it might well be amended by saying 'but nothing herein shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate of foreign commerce.'" 1923 Hearing at 14. That letter is the first appearance of the exact language of the exemption clause in the legislative or drafting history.

When the bill was reintroduced in the next session of Congress, it included Secretary Hoover's language—the exemption clause. This inclusion pacified the labor-union objections, and the FAA became law. *E.g.*, *Circuit City*, 532 U.S. at 127 (Stevens, J., dissenting); *Textile Workers*, 353 U.S. at 466–67 & n.2 (Frankfurter, J., dissenting); Proceedings of the Forty-Fifth Annual Convention of the American Federation of Labor 52 (1925) ("Protests from the American Federation of Labor and the International Seamen's Union brought an amendment which provided that 'nothing herein contained shall apply to contracts of employment of seamen, railroad employe[e]s or any other class of workers engaged in foreign or interstate commerce.' This exempted labor from the provisions of the law, although its sponsors denied there was any intention to include labor disputes.").

All of the debate surrounding the Section 1 exemption concerned workers who, because they were traditional employees and typically represented by la-

bor organizations, were or would be subject to special dispute-resolution schemes incompatible with the FAA. The history of Section 1 therefore rejects the conclusion of the court below that Congress's use of the term "contracts of employment" was somehow intended to reach a broader class of workers that includes independent contractors.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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MAY 2018

No. 17-340

In the Supreme Court of the United States

NEW PRIME, INC.

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. One of the Chamber's responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Society for Human Resource Management ("SHRM") is the world's largest human resources professional society, representing 285,000 members in more than 165 countries. For nearly seven decades, SHRM has been the leading provider of resources serving the needs of HR professionals and advancing the practice of human resource management. SHRM has more than 575 affiliated chapters within the United States. Since its founding, one of SHRM's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to the realities of the workplace.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Both parties have consented to the filing of this brief.

Many of *amici*'s members and affiliates regularly rely on arbitration agreements in their contractual relationships. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the policy reflected in the Federal Arbitration Act ("FAA"), *amici*'s members have structured millions of contractual relationships—including large numbers of agreements with independent contractors—around the use of arbitration to resolve disputes.

Amici have a strong interest in reversal of the judgment below. The First Circuit's decision announcing that the FAA does not apply to independent contractors in the transportation industry cannot be squared with either the text or historical context of the FAA, and undermines an entire industry's reliance on the national policy favoring arbitration.

INTRODUCTION AND SUMMARY OF ARGUMENT

Independent contractors play an essential role in the modern economy. According to one study, between 2010 and 2014, the number of independent contractors "increased by 2.1 million workers," accounting for "28.8 percent of all jobs added." Will Rinehart & Ben Gitis, *Independent Contractors And The Emerging Gig Economy*, American Action Forum (July 29, 2015), https://tinyurl.com/zevgo4s. That "number is expected to keep growing at a steady clip." Brendon Schrader, *Here's Why The Freelancer Economy Is On The Rise*, Fast Company (Aug. 10, 2015), https://tinyurl.com/ya5b78as.

Participants in this large, and rapidly expanding, sector of the economy rely upon the enforceability of agreements between businesses and independent contractors. Many of those agreements provide for arbitration of disputes because arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court.

If the decision below is allowed to stand, however, untold thousands of arbitration agreements would be called into question. Specifically, the panel majority held that Section 1 of the FAA's narrow exclusion of "contracts of *employment*" involving transportation workers also eliminates the FAA's protection of arbitration agreements entered into by independent contractors. 9 U.S.C. § 1 (emphasis added).

That holding is wrong under both the plain text of Section 1 and the context in which Congress enacted it in 1925—especially in light of this Court's admonitions that Section 1 must be given a "narrow construction" and "precise reading." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 118, 119 (2001).

The distinction between employees and independent contractors is well established in the law, and it was settled at the time the FAA was enacted in 1925. Indeed, this Court made clear in *Circuit City* that the exemption to arbitration contained in Section 1 was designed to avoid conflicts with existing or soon-to-be-enacted federal statutes that had their own dispute-resolution mechanisms for certain kinds of *employees*, such as "seamen," "railroad employees," and "employees" of "air carriers." 532 U.S. at 120-21. But those other federal statutes do not reach independent contractors, and therefore it would have made no sense for Congress to include independent contractors within Section 1's exemption.

Finally, this Court should also hold that factfinders must take a categorical approach to evaluating the applicability of the Section 1 exemption in a particular case based on the language of the contract between the parties. See *In re Swift Transp. Co.*, 830 F.3d 913, 920 (9th Cir. 2016) (Ikuta, J., dissenting). As petitioner details, permitting searching, fact-bound inquiries into the parties' relationship—an analysis that will often overlap with the merits of the parties' dispute, particularly in misclassification cases like this one—would undermine the very simplicity, informality, and expedition of arbitration to which the parties agreed and that the FAA is designed to protect. This Court has rejected such an approach in other contexts, and should do so here.

ARGUMENT

I. Section 1 Does Not Exclude Independent Contractors From Coverage Under The FAA.

A. Independent Contractor Agreements Are Not "Contracts Of Employment."

Section 1 of the FAA provides that the statute's federal protections for arbitration agreements do not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The phrase "contracts of *employment*" in this Section means what it says: a contract between an employer and an employee—not an agreement with an independent contractor to perform work.

The First Circuit brushed aside the uniform contrary case law as (in its view) insufficiently reasoned. The panel dismissed many of these decisions as "simply assum[ing] * * * that independent-contractor

agreements are not contracts of employment under § 1" (JA173), but that criticism is unfair, because any such assumption necessarily rests on the plain language of the statute. "Because the plain language of" Section 1 is "unambiguous," this Court's inquiry both "begins" and "ends" with the statutory text. *Nat'l Ass'n of Mfrs.* v. *Dep't of Defense*, 138 S. Ct. 617, 631 (2018) (quotation marks omitted).

The panel majority itself acknowledged that *Black's Law Dictionary* treats "contract of employment" as synonymous with "employment contract"—a usage that dates back to 1927—and defines that term as one would expect: as a "contract between an *employer* and *employee* in which the terms and conditions of employment are stated." JA178 n.19 (quoting BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added)).

But the panel majority instead relied on dictionary definitions of the broader verb "employ" and various instances where the phrase "contract of employment" was used outside the context of the FAA (or any other federal statute) to conclude that Congress must have meant to exempt independent contractors under Section 1. JA178-179 & nn.19-20. That expansive reading of the Section 1 exemption conflicts with this Court's instruction to give "the § 1 provision * * * a narrow construction." *Circuit City*, 532 U.S. at 118.

The panel also looked to dictionary definitions of "independent contractor" that referred to the contractor "exercising an independent employment." JA181 n.20. That use of the word "employment" in a vacuum offers little guidance on the meaning of the statutory phrase "contract of employment," however, and does not undermine the established distinction

between employees and independent contractors at the time of the FAA's enactment.

As one of those same dictionaries pointed out, while "[s]trictly and etymologically, [employee] means 'a person employed,'" in practice and "as generally used," the word was "understood to mean some permanent employment or position." BOUVIER'S LAW DICTIONARY 1035 (8th ed. 1914). An "independent contractor," by contrast, contracted to do work by his own methods "and without being subject to the control of his employer, except as to the result of his work." *Id.* at 1533.

Thus, as one scholar has summarized, "'employee' served mainly as a near substitute for 'servant,' and it seems always to have been accepted by the courts that neither term extends to persons of 'independent employment' or 'independent contractors' as such persons came to be known." Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One And How It Ought To Stop Trying*, 22 Berkeley J. of Emp. & Lab. L. 295, 309-10 (2001) (footnote omitted).

Indeed, far from being a modern legal invention, "the distinction between employees and independent contractors has deep roots in our legal tradition." *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712, 721-22 (1996). As petitioner's brief explains in detail (at 18-21), distinctions in the law between master-servant relationships and other work relationships date back to the 1300s and were recognized by Blackstone. See Ordinance of Labourers, 23 Edw. III (1349); 1 William Blackstone, *Commentaries on the Laws of England*, *422-32.

Moreover, the development of the law on vicarious liability led to the specific conception of an independent contractor as distinct from an employee under the familiar master-servant standard. That test for distinguishing between the two "was first developed in the mid-nineteenth century by English courts and was soon adopted by American courts." John Bruntz, *The Employee/Independent Contractor Dichotomy: A Rose Is Not Always A Rose*, 8 Hofstra Lab. L. J. 338, 339 (1991) (citing *Boswell* v. *Laird*, 8 Cal. 469 (1857)). Numerous decisions from circuit courts prior to the enactment of the FAA acknowledged this distinction. See Pet. Br. 20-21. And the distinction was taken as settled law in the First Restatements of Law, issued less than a decade after the FAA's enactment. See Restatement (First) of Agency § 2, cmt. a (1933); Restatement (First) of Torts § 409 cmt. a (1934).

In sum, the statutory text and the relevant legal context make clear that "contracts of employment" means contracts with an employee, and does not include agreements with an independent contractor.

B. Section 1 Was Enacted Against The Backdrop Of Other Federal Statutes That Apply Only To Employees And Do Not Encompass Independent Contractors.

Limiting Section 1's exclusion to contracts with employees is also compelled by the context in which Section 1 was enacted.

This Court in *Circuit City* explained at length that the residual category of "workers engaged in * * * commerce" must be "controlled and defined by reference to the enumerated categories of workers

which are recited just before it"—namely, "seamen" and "railroad employees." 532 U.S. at 115. And the Court determined that "seamen" and "railroad employees" were excluded from the FAA because "[b]y the time the FAA was passed, Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their employers"; "grievance procedures existed for railroad employees under federal law"; "and the passage of a more comprehensive statute providing for the mediation and arbitration of railroad labor disputes was imminent." *Id.* at 121 (citing, respectively, the Shipping Commissioners Act of 1872, 17 Stat. 262; Transportation Act of 1920, 41 Stat. 456; and Railway Labor Act of 1926, 44 Stat. 577).

As this Court summarized: "[i]t is reasonable to assume that Congress excluded 'seamen' and 'railroad employees' from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers." *Circuit City*, 532 U.S. at 121. The residual category of other transportation workers was included for a similar reason. *Cf. Epic Sys. Corp.* v. *Lewis*, No. 16-285, --- S. Ct. ----, Slip Op. 12 (May 21, 2018) ("[W]here, as here, a more general term follows more specific terms in a list, the general term is usually understood to embrace only objects similar in nature to those objects enumerated by the preceding specific words.") (quotation marks omitted). That is, Congress contemplated extending similar legislation to other categories of employees: "Indeed, such legislation was soon to follow, with the amendment of the Railway Labor Act in 1936 to include air carriers and their employees." *Circuit City*, 532 U.S. at 121.

Significantly, these other federal statutes were, and are, limited in scope to *employees*, as that term is traditionally understood. For example, the Railway Labor Act defines "employee" by incorporating ordinary common-law concepts of direction and control: "[t]he term 'employee' as used herein includes every person in the service of a carrier (subject to *its continuing authority to supervise and direct the manner of rendition of his service*) who performs any work defined as that of an *employee* or subordinate official." Railway Labor Act of 1926, § 1, Pub. L. No. 69-257, 44 Stat. 577 (emphases added).

Other federal laws governing railroad workers and seamen point in the same direction. They also adopt the common-law approach to who counts as an "employee"—and therefore necessarily incorporate the distinction between an employee and an independent contractor.

The Federal Employers' Liability Act was enacted in 1908, and applies only to "employee[s]" who are injured "while * * * employed by" a "common carrier by railroad." 45 U.S.C. § 51. As this Court has held, "[f]rom the beginning the standard" for application of FELA "has been proof of a master-servant relationship between the plaintiff and the defendant railroad." *Kelley* v. *S. Pac. Co.*, 419 U.S. 318, 323 (1974). In reaching that holding, the Court reiterated its pronouncement from a decade *prior* to the enactment of the FAA that "the words 'employee' and 'employed' in the statute were used in their natural sense, and were 'intended to describe the conventional relation of employer and employee.'" *Id.* (quoting *Robinson* v. *Baltimore & Ohio R. Co.*, 237 U.S. 84, 94 (1915)).

The Jones Act, which was enacted in 1920, extended the same principles previously enacted in

FELA to seamen, providing that "[a] seaman injured in the course of *employment* * * * may elect to bring a civil action at law * * * against the *employer*. Laws of the United States regulating recovery for personal injury to, or death of, a railway *employee* apply to an action under this section." 46 U.S.C. § 30104 (formerly codified at 46 U.S.C. § 688) (emphases added); see also, *e.g.*, *Chandris, Inc.* v. *Latsis*, 515 U.S. 347, 368-72 (1995) (describing the "essential contours of the employment-related connection to a vessel in navigation required for an employee to qualify as a seaman under the Jones Act"); *Bach* v. *Trident Shipping Co., Inc.*, 708 F. Supp. 772, 773 (E.D. La. 1988) ("It is by now well established that an employer-employee relationship is essential for recovery under the Jones Act.").

The line drawn in these specific statutory contexts also is consistent with this Court's broader pronouncement that when Congress uses the term "employee" in a statute without "helpfully defin[ing] it," Congress means "to incorporate traditional agency law criteria for identifying master-servant relationships." *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 319, 321 (1992) (construing Congress's definition of "employee" in ERISA); see also *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739-40 (1989) (using same mode of analysis to determine whether a statue had been, in the language of the Copyright Act of 1976, "prepared by an employee within the scope of his or her employment"). Incorporating these traditional principles therefore also encompasses "the common understanding * * * of the difference between an employee and an independent contractor." *Darden*, 503 U.S. at 327.

Thus, the statement by the panel below that independent contractors and employees performing transportation work "play the same necessary role in the free flow of goods" misses the point. JA181-82. Congress was not legislating based on individual *function*, but rather based on the coverage of the excluded categories of contracts under other extant federal statutes. Because those statutes do not apply to independent contractors, the Section 1 exclusion similarly does not encompass those agreements.

Finally, there is nothing "strange" (JA181) about Congress' decision in the FAA to exempt from its coverage only those transportation workers who were subject to "more specific legislation," such as "established or developing statutory dispute resolution schemes." *Circuit City*, 532 U.S. at 121. A more modern example of the same congressional approach, for example, can be seen in the Class Action Fairness Act, which "carves out" from its conferral of jurisdiction "class actions for which jurisdiction exists elsewhere under federal law, such as under the Securities Litigation Uniform Standards Act." *Estate of Pew* v. *Cardarelli*, 527 F.3d 25, 30 (2d Cir. 2008) (citing 28 U.S.C. § 1332(d)(9)(A)).

* * *

In short, the text, structure, and context of the FAA confirm that Section 1's exemption for "contracts of employment" of transportation workers applies only to employees, not independent contractors.

II. Excluding Independent Contractors From The FAA Harms Businesses, Independent Contractors, And Consumers.

The First Circuit's interpretation of Section 1 to exempt independent contractors from the FAA is not

only wrong, but also carries significant real-world adverse consequences. That interpretation forecloses the entire transportation sector from obtaining the benefits of arbitration as secured by the FAA.

This Court recognized in *Circuit City* that "there are real benefits to the enforcement of arbitration provisions," including "allow[ing] parties to avoid the costs of litigation." 532 U.S. at 122-23; see also, *e.g.*, *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution."); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995) (recognizing that one of the "advantages" of arbitration is that it is "cheaper and faster than litigation") (quotation marks omitted).

In addition, the empirical evidence confirming that employees tend to fare better in arbitration apply with equal force to independent contractors. Studies have shown that those employees who arbitrate their claims are more likely to prevail than those who go to court. See, *e.g.*, Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 46 (1998). For example, one study of employment arbitration in the securities industry found that employees who arbitrated were 12% more likely to win their disputes than were employees who litigated in the Southern District of New York. See Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (Nov. 2003-Jan. 2004). And the arbitral awards that the employees obtained were typically the same as, or larger than, the court awards. See *ibid.* A 2004 report compiled a number of employment arbitration

studies and concluded that employees were 19% more likely to win in arbitration than in court. See Nat'l Workrights Inst., *Employment Arbitration: What Does the Data Show?* (2004), available at goo.gl/nAqVXe. As one scholar recently agreed, "there is no evidence that plaintiffs fare significantly better in litigation [than in arbitration]"; rather, arbitration is "favorable to employees as compared with court litigation." Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 Ohio St. J. on Disp. Resol. 1, 16 (2017) (quotation marks omitted; alterations in original).

Numerous businesses enter into agreements with independent contractors. See Rinehart & Gitis, *supra*; Schrader, *supra*. Businesses in the transportation industry are no exception. This Court recognized over sixty years ago that transportation "[c]arriers * * * have increasingly turned to owner-operator truckers to satisfy their need for equipment as their service demands." *Am. Trucking Ass'ns, Inc.* v. *United States*, 344 U.S. 298, 303 (1953); see also *Transamerican Freight Lines, Inc.* v. *Brada Miller Freight Sys.*, 423 U.S. 28, 35 (1975) (recognizing the role of independent contractors in avoiding "waste of resources" from fluctuating "[d]emand for a motor carrier's services"). More recently, the Census Bureau reported that over half a million trucks nationwide are primarily operated by owner operators. See U.S. Census Bureau, *2002 Economic Census: Vehicle Inventory and Use Survey* 15, 39 (Dec. 2004), https://tinyurl.com/yb4yy3ed.

But if the decision below is permitted to stand, businesses in the transportation industry could be deprived of the simplicity, informality, and expedi-

tion of arbitration for resolving disputes with independent contractors. And the resulting increase in litigation costs would ultimately be borne by consumers in the form of higher prices and by independent contractors who receive lower payments.

Moreover, "private parties have likely written contracts relying on [this Court's FAA precedent] as authority." *Allied-Bruce*, 513 U.S. at 272. The decision below, however, deprives businesses of the ability to rely upon the uniform national policy favoring arbitration embodied by the FAA. Instead, they will be able to obtain the benefits of arbitration, if at all, only under a patchwork of state laws that lack the FAA's protection against rules that "single[] out arbitration agreements for disfavored treatment." *Kindred Nursing Ctrs. Ltd. P'Ship* v. *Clark*, 137 S. Ct. 1421, 1425 (2017).

In short, businesses should be able to rely on the protections of the FAA in their independent contractor agreements.

III. The Applicability Of The Section 1 Exemption Should Be Determined Based On The Terms Of The Parties' Agreement.

If, for the reasons explained above, Section 1's exemption for "contracts of employment" is properly construed to cover only employee agreements, guidance is needed as to how a factfinder should determine whether the exemption applies in any given case.

The answer, as Judge Ikuta has persuasively explained, is to take a "categorical approach that focuses solely on the words of the contract." *In re Swift Transp. Co.*, 830 F.3d at 920 (Ikuta, J., dissenting). Contrary to the district court here, which ordered

"factual discovery" into the relationship between petitioner and respondent beyond the undisputed four corners of their contract (JA 151), Judge Ikuta's proposed approach accords with both the text and purposes of the FAA.

To begin with, Section 1 by its plain terms excludes certain types of "*contracts*" from the FAA's reach; the exemption is not tied to the nature of a particular working relationship. 9 U.S.C. § 1 (emphasis added). This Court recognized over fifty years ago that Section 1 "expressly exclude[s] from the reach of the Act" certain "*categories* of contracts." *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 n.9 (1967) (emphasis added).

Moreover, the contrary approach endorsed by the district court here would in many cases make the threshold question of the applicability of the FAA turn on the merits of their underlying dispute. In a misclassification case like this one, for example, the dispute over whether the plaintiff is in actuality an independent contractor or an employee is precisely the underlying dispute that the parties agreed to submit to an arbitrator for resolution. Yet as this Court has held in other contexts, when a motion to compel arbitration has been filed, "a federal court may consider *only* issues relating to the making and performance of the agreement to arbitrate." *Prima Paint*, 388 U.S. at 404 (emphasis added). *Cf. Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 449 (2006) (explaining that challenges to "the validity of the [parties'] contract as a whole" must be resolved by the arbitrator). As the Court has explained, "[i]n so concluding, we honor not only the plain meaning of the statute, but also the unmistakably clear congressional purpose that the arbitration procedure,

when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint*, 388 U.S. at 404.[2]

A factual inquiry into the parties' relationship whenever a party in the transportation industry moves to compel arbitration would impose significant cost and delay in resolving the threshold question of arbitrability. That result is "in contravention of Congress' intent 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.'" *Preston* v. *Ferrer*, 552 U.S. 346, 357 (2008) (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983)).

The Court has made clear that Section 1 should not interpreted in a manner that introduces "considerable complexity and uncertainty * * *, in the process undermining the FAA's proarbitration purposes and 'breeding litigation from a statute that seeks to avoid it.'" *Circuit City*, 532 U.S. at 123 (quoting *Allied-Bruce*, 513 U.S. at 275); cf. *American Express Co.* v. *Italian Colors Restaurant*, 570 U.S. 228, 239 (2013) (rejecting the imposition of a "preliminary lit-

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[2] See also, *e.g.*, *Blinco* v. *Green Tree Servicing, LLC*, 366 F.3d 1249, 1252 (11th Cir. 2004) ("the party moving to enforce an arbitration provision [has] a right not to litigate the dispute in a court and bear the associated burden"); *CIGNA HealthCare of St. Louis, Inc.* v. *Kaiser*, 294 F.3d 849, 855 (7th Cir. 2002) (explaining that permitting "discovery on the merits" before "the issue of [the] arbitrability [of the dispute] is resolved puts the cart before the horse" because, "[i]f a dispute is arbitrable, responsibility for the conduct of discovery lies with the arbitrators"); *Local 771, I.A.T.S.E.* v. *RKO General, Inc., WOR Div.*, 546 F.2d 1107, 1113 (2d Cir. 1977) ("[T]he bargained-for purpose of arbitration * * * is the avoidance of litigation and its concomitant costs and delays.").

igating hurdle" onto requests to compel arbitration that "would undoubtedly destroy the prospect of speedy resolution that arbitration * * * was meant to secure"; "[t]he FAA does not sanction such a judicially created superstructure").

For these reasons, Section 1's applicability should turn solely on the terms of the relevant agreement.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 2018

No. 17-340

IN THE

Supreme Court of the United States

NEW PRIME, INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF *AMICUS CURIAE* OF CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights, freedoms, and structural safeguards that our nation's charter guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text, history, and values, and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Enacted in 1925, the Federal Arbitration Act ("FAA") generally requires courts to enforce agreements to arbitrate disputes, foreclosing litigation over those disputes. 9 U.S.C. § 2. But the Act has an explicit exception for disputes arising from the employment of transportation workers: "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *Id.* § 1; *see Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001). In an effort to avoid being haled into court for

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

allegedly failing to pay its workers the minimum wage they were entitled to under federal and state law, Petitioner New Prime, Inc., asks this Court to construe that exception in an artificially narrow manner that is contrary to its plain text. This Court should reject that effort and affirm the decision below.

Respondent Dominic Oliveira is a long-haul truck driver who alleges that Petitioner New Prime, Inc., a national trucking company, violated federal and state law by failing to pay him and other drivers minimum wage. When Oliveira sued in federal court, however, New Prime moved to have the court enforce an arbitration agreement that Oliveira had signed as part of his employment paperwork. Resp. Br. 6-8. Although there is no dispute that Oliveira is a "worker[] engaged in . . . interstate commerce," New Prime argues that the FAA's Section 1 exemption does not apply.

New Prime claims that its agreement with Oliveira is not a "contract of employment" because, it says, Oliveira was an independent contractor under common-law agency principles, rather than a company employee. According to New Prime, when Congress used the term "contracts of employment" in the FAA, it meant "only contracts between an *employer* and an *employee* that stated the terms and conditions of *employment*." Pet'r Br. 8.

The problem with New Prime's argument is that, when Congress enacted the FAA nearly a century ago, those words did not have the same meanings and connotations they do now. Today, "employment" tends to suggest an ongoing legal relationship in which individuals labelled "employees" are paid wages or salaries in exchange for their work, the details of which are subject to the supervision and control of the employer. *See, e.g.*, *Black's Law Dictionary* 564, 566 (8th ed. 2004). But that simply was not the case when the FAA

was enacted in 1925. While the common-law concept of a "master-servant" relationship was well established by that point, and was mutually exclusive with independent-contractor status, the word "employment" had nothing to do with the distinction between servants and independent contractors.

Rather, the words "employment," "employer," and "employ" had much different meanings in 1925, both in common parlance and in legal discourse. Those words signified the general concept of utilizing a person's time or effort, or more specifically, engaging a person in a professional capacity to perform work in exchange for payment. As a result, the term "contract of employment" was routinely used to refer to agreements with independent contractors, no less than agreements with individuals who worked for wages or salaries under master-servant conditions. And that is how Congress and the public would have understood the term when it was used in the FAA. New Prime has produced no evidence to the contrary.

Instead, New Prime tries to exploit a shift in linguistic usage that has taken place since 1925. In the late nineteenth and early twentieth centuries, as the nation moved toward an industrial economy, a new term, "employee," came to be used with increasing frequency, modelled on a similar French word. As a general and abstract term that could be applied across vocations, the term "employee" was well suited for use in the context of large work forces laboring in factories, in offices, or in other impersonal settings such as on railroads; hence, it gradually came to replace the more antiquated term "servant" and more specific terms like "clerk" and "workman." Increasingly, the master-servant relationship was referred to as the employer-employee relationship. And as this shift took place, it

began to influence the way that other words based on the root "employ" were used.

That is why, today, "employment" can be defined as "[t]he relationship between master and servant," *Black's Law Dictionary* 566 (8th ed. 2004), and "employment contract" can be defined as "[a] contract between an employer and employee in which the terms and conditions of employment are stated," *id.* at 344. But in 1925, that simply was not yet the case. The term "contracts of employment" had exactly the broad meaning identified by the decision below: "agreements to perform work." J.A. 177.

New Prime's argument, in short, is a study in anachronism. It begins with a present-day definition of "contracts of employment" and attempts to graft that definition onto the past. This approach is literally backward, and the Court should reject it.

ARGUMENT

I. When Congress Enacted The FAA, "Employment" Was A Broad And General Term That Did Not Connote A Master-Servant Relationship.

A. The FAA's exemption provision was written to ensure that the Act would not affect "contracts of employment" of interstate transportation workers. 9 U.S.C. § 1. Because the Act does not define "employment" or "contracts of employment," those terms must be taken to have their "ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)); *see Perrin*, 444 U.S. at 42 (when construing a term, this Court "look[s] to the ordinary meaning of the term . . . at the time Congress enacted

the statute"); *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (same).

To identify this ordinary meaning, the Court consults "[d]ictionaries from the era of [the statute]'s enactment." *Sandifer*, 571 U.S. at 227; *see, e.g.*, *id.* at 227-28 (relying on contemporaneous editions of *Webster's New International Dictionary* and the *Oxford English Dictionary*); *Wis. Cent. Ltd.*, 138 S. Ct. at 2070 (same, plus *Black's Law Dictionary*); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 228 (1994) (relying on contemporaneous dictionaries and noting that the period of a statute's enactment is "the most relevant time for determining a statutory term's meaning").

Significantly, therefore, when a word's meaning has changed over time, this Court interprets that word according to how it was defined when Congress passed the relevant legislation, not according to its modern definition. *See Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 609-12 (1987) (where the question was whether a plaintiff had "alleged *racial* discrimination within the meaning of § 1981," relying on contemporaneous dictionaries to show that "[t]he understanding of 'race' in the 19th century . . . was different" than it is "today").

B. At the time of the FAA's enactment, the term "contract of employment" was not defined in popular, historical, or legal dictionaries. Nor was "employment contract." This suggests that neither formulation was a recognized term of art. Dictionaries of the era did, however, define the word "employment." And those definitions consistently gave the word a broad meaning—one that encompassed paying another person for his or her work, whether or not the common-law criteria for a master-servant relationship were satisfied.

For instance, the first edition of *Webster's New International Dictionary*, which was the version of *Webster's* current between 1909 and 1934, defines "employment" simply as:

- Act of employing, or state of being employed.
- That which engages or occupies; that which consumes time or attention; occupation; office or post of business; service; as, agricultural *employments;* public *employment.*

Webster's New International Dictionary 718 (1st ed. 1930). Nothing in these definitions even invokes the concept of a master-servant legal relationship, typically defined by the employer's "power to direct the time, manner, and place of the services." *Black's Law Dictionary* 997 (8th ed. 2004). Much less does *Webster's* limit the word "employment" to that context, or signal any special focus on it. At its most specific, the *Webster's* definition of "employment" simply means "occupation," "office or post of business," and "service." *Id.* Illustrating this broad meaning, *Webster's* provides the following words as synonyms: "Work, business, vocation, calling, office, service, commission, trade, profession." *Id.*

The contemporaneous edition of the *Oxford English Dictionary* (its first edition) tells the same story.[2] It lists the following definitions of "employment":

- The action or process of employing; the state of being employed.

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[2] The first edition of the *Oxford English Dictionary* was published in ten separate volumes issued between 1884 and 1928, as *A New English Dictionary on Historical Principles*. In 1933, these ten volumes were comprehensively reissued as a new set, under the dictionary's present title. *See History of the OED*, https://public.oed.com/history/.

- The service (of a person).
- That on which (one) is employed; business; occupation; a special errand or commission.
- A person's regular occupation or business; a trade or profession.

3 *A New English Dictionary on Historical Principles* 130 (1st ed. 1897).[3] Again, even where these definitions relate specifically to business or vocation, they do not suggest any particular focus on the master-servant relationship, or on the other traits of what we would today call an employer-employee relationship. Instead, definitions such as "a special errand or commission" and a "person's regulation occupation or business" plainly encompass agreements between independent contractors and those making use of their services.

Legal dictionaries from the era are no different. The 1910 edition of *Black's Law Dictionary* indicates that "employment" includes "an engagement or rendering services for another," *Black's Law Dictionary* 422 (2d ed. 1910), but narrows the definition no further. To the contrary, it cautions against limiting the word even to that broad meaning: "This word does not necessarily import an engagement or rendering services for another. A person may as well be 'employed' about his own business as in the transaction of the same for a principal." *Id.* The same text was included in the next edition, accompanied by a new definition: "The act of hiring, implying a request and a contract for compensation." *Black's Law Dictionary* 658 (3d ed.

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[3] The dictionary provides three other definitions marked as "obsolete": "The use or purpose to which a thing is devoted," "An official position in the public service; a 'place,'" and "Implement." 3 *A New English Dictionary on Historical Principles* 130 (1st ed. 1897).

1933) (citation omitted). Nothing here even hints that "employment" requires a master-servant relationship or excludes independent contractors.

The 1914 edition of *Bouvier's Law Dictionary* contains no entry for "employment" but defines "employed" as "[t]he act of doing a thing, and the being under contract or orders to do it." 1 *Bouvier's Law Dictionary* 1035 (1914 ed.). Its 1926 edition, under a different editor and publisher, includes an entry for "employment" broadly stating that "'employment, profession or trade' means some business, employment, profession or trade in which one is engaged." *Id.* at 354 (1926 ed.); *see id.* (also noting that "employment" can encompass time spent on an employer's premises although not actually engaged in work).

The *Cyclopedic Law Dictionary*, published in 1912, similarly defines "employment" as "[a] business or vocation," and "[t]he service of another." *The Cyclopedic Law Dictionary* 314 (1st ed. 1912). Its next edition, published in 1922, expands upon this definition only by adding "calling; office; service; commission[;] trade; profession" and "the act of employing, in another sense, the state of being employed." *Id.* at 350 (2d ed. 1922). That entry is unchanged in the 1940 edition. *Id.* at 381 (3d ed. 1940).

In sum, the dictionaries in circulation when Congress enacted the FAA did not limit the word "employment" to conditions involving a common-law master-servant relationship. *Cf.* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 419, 422 (2012) (identifying the current editions of *Webster's*, the *Oxford English Dictionary*, *Black's Law Dictionary*, *Bouvier's Law Dictionary*, and *The Cyclopedic Dictionary of Law* as among "the most useful and authoritative" dictionaries for establishing the meanings of words in the first half of the twentieth

century). Nor did these dictionaries suggest that the master-servant relationship had any particular significance to the word's meaning at all. That concept is entirely absent.

Notably, therefore, this is *not* a situation in which dictionaries from the period contain multiple definitions of the word, one supporting New Prime's position and one supporting Respondent Oliveira's position. *Cf. MCI Telecomms. Corp.*, 512 U.S. at 227 ("Most cases of verbal ambiguity in statutes involve . . . a selection between accepted alternative meanings shown as such by many dictionaries."). Were that the case, New Prime might argue that its preferred definition—even if the less common of the two—was the one that Congress intended in the FAA's exemption provision. *See Sandifer*, 571 U.S. at 231-32 (relying on "the broader statutory context" to choose between "two common meanings" that a term was given in dictionaries from when the legislation was adopted). But here there is no competition between rival definitions. The one offered by New Prime is nowhere to be found.

This Court has rejected the arguments of parties who "cite dictionary definitions contained in, or derived from, a single source." *MCI Telecomms. Corp.*, 512 U.S. at 225. All the more forcefully, therefore, it should reject the arguments of a party who cannot cite *any* contemporaneous dictionary for its claimed definition of a statutory term. *Cf. Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 418 (1992) ("The existence of alternative dictionary definitions of the word . . . indicates that the statute is open to interpretation."). New Prime cannot show that any dictionary from when the FAA was enacted contained the anachronistic definition of "employment" that it advocates. To be sure, "a statute may make a departure from the natural and popular acceptation of language,"

Sandifer, 571 U.S. at 228 (quotation marks omitted), but "text or context" must provide strong evidence of such a departure before this Court will give a word "anything other than [its] ordinary meaning," *id.* And the clearer it is that the relevant dictionaries defined a term a certain way, the higher the burden on any party who advocates reading that term differently.

C. To appreciate why "employment" did not have the meaning in 1925 that New Prime claims, it helps to understand where the root word "employ" came from and how its meaning, and those of its derivatives, had developed up to that point.

The word "employment," first used in the fifteenth century, was created by adding a suffix to the verb "employ." *See* "Employment," *Oxford English Dictionary* (3d. ed. 2014). That verb had been borrowed in the Middle Ages from the French and Anglo-Norman word "imploier," which meant "to use or apply (for a purpose), to put to work," "to engage (someone) in an occupation," and "to occupy (time) with an activity." "Employ," *Oxford English Dictionary* (3d ed. 2014). And this word, in turn, had its origin in the classical Latin word "implicāre," meaning "to enfold" and "to involve." *Id.* (noting the connection between this word and the verb "to implicate").

Consistent with these roots, in English the verb "employ" originally meant simply to utilize something for a purpose. This traditional, general meaning was reflected in the first three definitions of "employ" listed by *Webster's* in the early twentieth century:

- To . . . involve.
- To make use of, as an instrument, means, or material; to apply; use; as, to *employ* the pen in writing, bricks in building, words and phrases in speaking.

- To occupy; busy; devote; concern; as, to *employ* time in study; to *employ* one's energies to advantage.

Webster's New International Dictionary 718 (1st ed. 1930). The first three definitions in the *Oxford English Dictionary* were similar:

- To apply (a thing) to some definite purpose; to use as a means or instrument[.]
- To apply, devote (effort, thought, etc.) to an object.
- To make use of (time, opportunities). . . . In mod[ern] use also . . . 'to fill with business[.]'

3 *A New English Dictionary* 129-30 (1st ed. 1897); *see id.* (noting that "[t]he senses of this word . . . are derived from the late L[atin] sense of *implicare* 'to bend or direct upon something'").

To "employ" later came to signify, more specifically, the concept of occupying *a person's* time or effort. And that sense of the word was well suited to describe the act of engaging another person to perform tasks in exchange for payment. Thus, the *Oxford English Dictionary*'s first edition reported that "employ" also meant:

- To find work or occupation for (a person, his bodily or mental powers)[.]
- To use the services of (a person) in a professional capacity, or in the transaction of some special business; to have or maintain (persons) in one's service.

Id. at 130. *Webster's* captured this meaning in similar terms:

- To make use of the services of; to have or keep at work; to give employment to; to intrust with

> some duty or behest; as, to *employ* a hundred workmen; to *employ* an envoy; often, in the passive, to have employment; to be at work; as, he has been *employed* for some time.

Webster's New International Dictionary 718 (1st ed. 1930).

Significantly, even these newer and more refined definitions were not limited to contexts in which a master-servant legal relationship existed. Instead, they squarely embraced the hiring of a person who qualified as an independent contractor: someone engaged to perform a particular task, compensated for the successful completion of that task, and free to direct the details of the task's completion. Each definition, for instance, would fit the hiring of an attorney just as well as a factory worker or domestic servant.

The 1910 and 1933 editions of *Black's Law Dictionary* likewise defined "employ" in broad terms. This definition reflects both the word's traditional, generic meaning—utilizing a person's efforts for a purpose—and the more precise concept of paying someone for his or her labor:

- To engage in one's service; to use as an agent or substitute in transacting business; to commission and intrust with the management of one's affairs; and, when used in respect to a servant or hired laborer, the term is equivalent to hiring, which implies a request and a contract for compensation, and has but this one meaning when used in the ordinary affairs and business of life.

Black's Law Dictionary 421 (2d ed. 1910); *id.* at 657 (3d ed. 1933). While this definition makes a specific reference to the hiring of servants, it is not limited to that context. Rather, it describes the use of the word "in

respect to a servant *or* hired laborer" (emphasis added), the latter of which could include independent contractors, whose hiring involves "a request and a contract for compensation." *Id.*

In short, as of the early twentieth century the verb "employ" retained its broad original meanings, which centered around using something or someone for a purpose. The word also had developed a more specific sub-definition that reflected a particular type of economic transaction—paying someone for their work. But as yet, the word had no inherent connection with the presence of a master-servant relationship.[4]

That would change later in the twentieth century, driven by the increasing use of the newer term "employee" and its ripple effects on the meanings of other *employ*-related words. *See* Part II, *infra*. But when the FAA was enacted, the meaning of "employ" had not yet been transformed by this change. Nor had the meaning of the word "employment," which retained the broad definition previously discussed. And as shown, "that definition d[id] not exclude, either

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[4] The reference to "the conventional relation of employer and employee" in *Robinson v. Baltimore & O.R. Co.*, 237 U.S. 84, 94 (1915), does not indicate otherwise. In that case—which did not involve distinguishing independent contractors from servants or employees—this Court rejected the unconventional notion that a porter who worked for the Pullman Company was somehow also employed by the railroad carrier on which Pullman's train cars operated. The Court held that the porter was instead "a servant of another master," the Pullman Company, which "selected its [own] servants, defined their duties, fixed and paid their wages, directed and supervised the performance of their tasks, and placed and removed them at its pleasure." *Id.* at 93. In other words, the Court held that the porter was not "employed" by the railroad carrier because he had *no* legal or contractual relationship with that carrier, even though some of his services benefitted the carrier as an "incidental matter." *Id.*

explicitly or implicitly," independent contractor arrangements. *Sandifer*, 571 U.S. at 228.

D. The broad meaning of "employment" in the early twentieth century, which encompassed paid work with or without a master-servant relationship, was not found only in dictionary definitions. It was also reflected in actual usage, which matched those definitions perfectly.

Court decisions and legal treatises issued in the years leading up to the FAA's enactment regularly used the word "employment" to cover the hiring of independent contractors. Indeed, the word "employment" was often found in the very definition of an "independent contractor." *See, e.g.*, *Simonton v. Morton*, 119 A. 732, 733 (Pa. 1923) ("Where a contract is let for work to be done by another in which the contractee reserves no control over the means of its accomplishment, but merely as to the result, *the employment* is an independent one establishing the relation of a contractee and contractor and not that of master and servant." (emphasis added)); *Murray v. Dwight*, 55 N.E. 901, 902 (N.Y. 1900) ("The relation of master and servant is often confused with some other relation. . . . There are many kinds of *employment* . . . where one person may render service to another without becoming his servant in the legal sense." (emphasis added)).

Likewise, in contemporary legal discourse, the party hiring an independent contractor was routinely labeled an "employer," and contractors were routinely described as being "employed." *See, e.g.*, *Flori v. Dolph*, 192 S.W. 949, 950-51 (Mo. 1917) (an "'independent contractor' is one, who . . . contracts to do a piece of work . . . without being subject to the control of *his employer* except as to the result of his work" (citing treatise)); *Prest-O-Lite Co. v. Skeel*, 106 N.E. 365, 367 (Ind. 1914) ("When *the person employing* may prescribe

what shall be done, but not how it is to be done, or who is to do it, the person *so employed* is a contractor, and not a servant."); *Embler v. Gloucester Lumber Co.*, 83 S.E. 740, 742 (N.C. 1914) ("An 'independent contractor' is said to be one who . . . contracts to do a piece of work . . . without being subject to *his employer*, except as to the result of the work[.]" (citing, *inter alia*, *Bouvier's Law Dictionary*)); *N. Bend Lumber Co. v. Chicago, M. & P.S. Ry. Co.*, 135 P. 1017, 1021 (Wash. 1913) ("A reservation by *the employer* of the right . . . to supervise the work for the purpose merely of determining whether it is being done in conformity to the contract does not affect the independence of the relation.") (emphasis added in all quotations).[5]

As one leading authority explained in 1922: "In cases involving independent contractors, the courts use various pairs of correlative expressions, such as 'employer' and 'person employed,' 'employer' and 'independent contractor;' [and] 'employer' and 'contractor[.]'" *General Discussion of the Nature of the Relationship of Employer and Independent Contractor*, § 4, 19 A.L.R. 226 (1922) (footnotes omitted); *see id.* § 6 ("the existence or absence of a right on *the employer's* part, to exercise control over the details of the work" determines "whether *the person employed* is or is not an independent contractor" (emphasis added)); *id.* § 9 (citing "the general principle which declares *an employer* to be exempt from liability for injuries caused by the torts of an independent contractor" (emphasis added)).

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[5] To similar effect, see also *Alexander v. R. A. Sherman's Sons Co.*, 85 A. 514, 515 (Conn. 1912) (quoting treatise); *Messmer v. Bell & Coggeshall Co.*, 117 S.W. 346, 348 (Ky. 1909) (citing treatise); *Keys v. Second Baptist Church*, 59 A. 446, 447 (Me. 1904); *City of Richmond v. Sitterding*, 43 S.E. 562, 563 (Va. 1903).

Unable to contest the evidence above, which reinforces the dictionary definitions set forth earlier, New Prime is reduced to arguing that the term "contracts of employment" should not be "deconstructed" and interpreted according to "atomized definitions of its constituent parts." Pet'r Br. 23. But this is a specious objection: the meaning of "employment" did not magically change when the word was incorporated into the term "contract of employment."

To the contrary, that term was used exactly as the meanings of its individual parts would suggest. It simply meant the hiring of someone to perform work. As such, the term "contracts of employment" was used to refer to agreements with independent contractors. *See, e.g.*, *Dobson's Case*, 128 A. 401, 402 (Me. 1925) ("whether the relation be that of master and servant or not is determined by ascertaining from the *contract of employment* whether the employer retains the power of directing and controlling the work, or has given it to the contractor"); *Chicago, R.I. & P. Ry. Co. v. Bennett*, 128 P. 705, 707 (Okla. 1912) ("the test is not whether the defendant did in fact control and direct plaintiff in his work, but is whether it had the right under *the contract of employment* . . . to so control and direct him in the work"); *Allen v. Bear Creek Coal Co.*, 115 P. 673, 679 (Mont. 1911) ("The relation of the parties under *a contract of employment* is determined by an answer to the question, Does the employé in doing the work submit himself to the direction of the employer, both as to the details of it and the means by which it is accomplished? If he does, he is a servant, and not an independent contractor. If, on the other hand, the employé has contracted to do a piece of work . . . in pursuance of a plan previously given him by the employer, without being subject to the orders of the

latter as to detail, he is an independent contractor.") (emphasis added in all quotations).

In short, contemporaneous dictionary definitions and actual usage were aligned. "Contracts of employment" meant "agreements to perform work." Resp. Br. 2. There is no basis for this Court to adopt New Prime's anachronistic limiting definition.

II. The Word "Employee" Gradually Influenced—And Limited—The Meaning Of The Term "Employment," But Only Well After The FAA Was Enacted.

A. As shown above, the terms "employment" and "contracts of employment" did not mean what New Prime says they meant in 1925. And New Prime does not cite a single contemporaneous source that supports its reading of those terms. Instead, New Prime attempts a sleight of hand by directing attention toward the word "employee." It argues that "at the time the FAA was enacted, it was well established that independent contractors were *not* employees." It further argues that "contracts of employment," as used in the FAA, means only "agreements that purport to establish an employer-employee relationship." Pet'r Br. 16-17. Thus, the syllogism concludes, contracts of employment do not include agreements with independent contractors.

What New Prime fails to acknowledge is that, when the FAA was written, "employee" was a term of relatively recent vintage, which had unique connotations not shared by the terms "employment," "employer," and "employ." As its use proliferated in the late nineteenth and early twentieth centuries, the term "employee" came to function as a replacement for the term "servant." And thus, what used to be called a master-

servant relationship increasingly was called an employer-employee relationship.

As these changes took effect, this use of the word "employee" gradually influenced the meanings of other words that incorporate the root "employ," such as "employment." That is why, today, the term "contracts of employment" tends to evoke "'[a] contract between an employer and employee,'" stating the terms of a specific type of ongoing legal relationship. Pet'r Br. 17 (quoting *Black's Law Dictionary* 393 (10th ed. 2014)). But when the FAA was passed in 1925, these changes had not yet occurred. The word "employment" did not yet have its modern association with an employer-employee relationship. New Prime's argument is built on exploiting this linguistic slippage. This Court has rebuffed such efforts in the past, *see Saint Francis Coll.*, 481 U.S. at 609-12, and it should do so again here.

B. Although the word "employee" shares common etymological roots with "employ," "employer," and "employment," its development in the English language was quite distinct. While those latter words date back to the 1400s and 1500s, the first recorded use of the word "employee" did not occur until the 1800s. *See* "Employee," *Oxford English Dictionary* (3d ed. 2014). Like "employer" and "employment," the word was formed by adding a suffix to the root word "employ." But unlike those other terms, "employee" was modelled on the nineteenth-century use of a similar word in French: the noun "*employé*." *Id.*; *see* 3 *A New English Dictionary* 130 (1st ed. 1897) ("a[fter] F[rench] *employé*"); *Bouvier's Law Dictionary* 353 (1926 ed.) ("From the French.").

By 1910, the word's relative novelty in English was still apparent. The entry for "employee" in that year's edition of *Black's Law Dictionary* begins as follows:

> This word is from the French, but has become somewhat naturalized in our language. Strictly and etymologically, it means "a person employed," but, in practice in the French language, it ordinarily is used to signify a person in some official employment, and as generally used with us, though perhaps not confined to any official employment, it is understood to mean some permanent employment or position. The word is more extensive than "clerk" or "officer."

Black's Law Dictionary 421-22 (2d ed. 1910) (quotation marks omitted).

The 1914 edition of *Bouvier's Law Dictionary* offers a similar definition (under an entry titled "Employé or Employee"), adding: "It may be any one who renders service to another." 1 *Bouvier's Law Dictionary* 1035 (1914 ed.). The word is further described as "[a] term of rather broad signification for one who is employed . . . . It is not usually applied to higher officers of corporations or to domestic servants, but to clerks, workmen, and laborers, collectively." *Id.*

The *Oxford English Dictionary* provided no substantial definition for "employee" in 1897, merely cross-referencing "employé" and adding, in the alternative: "Something that is employed." It defined "employé" as:

> One who is employed. (In Fr[ench] use chiefly applied to clerks; in Eng[lish] use *gen.* to the persons employed for wages or salary by a house of business, or by government.)

3 *A New English Dictionary* 130 (1st ed. 1897); *see id.* (quoting 1879 example: "In Italy, all railroad employés are subjected to rigorous examination.").

Webster's included a combined entry for "Employee, Employé," defining the term as "[o]ne employed by another; a clerk or workman in the service of an employer, usually disting. from *official* or *officer*, or one employed in a position of some authority." *Webster's New International Dictionary* 718 (1st ed. 1930).

Thus, "employee" was a comparatively recent addition to the English lexicon in the early twentieth century, a word that "developed along its own etymological path." *FCC v. AT&T Inc.*, 562 U.S. 397, 403 (2011). As these dictionary entries suggest, it may have been useful because it was a term "of rather broad signification," 1 *Bouvier's Law Dictionary* 1035 (1914 ed.), that conveyed the idea of "some permanent employment or position," *Black's Law Dictionary* 422 (2d ed. 1910), without reference to a specific profession or type of work. As such, "employee" was a generic term that could be applied equally to manual laborers and clerical staff, unlike narrower words like "clerk" and "workman." Moreover, it lacked some of the traditional connotations of the word "servant," including its association with work taking place in small establishments or the home.[6] In contrast, the more abstract term "employee" was well suited to describe the industrial-era phenomenon of large work forces laboring in factories,

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[6] *See* Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 Berkeley J. Emp. & Lab. L. 295, 308-09 (2001) ("[C]ourts tended to find important limitations in words such as 'laborer' and 'workman,' which connoted manual laborer and excluded the fast-growing class of clerical and office workers. . . . Although 'servant' was (and is) sometimes used in a very broad sense . . . it also carried the historical baggage of a class system and connoted a feudal relationship of domination and dependence that was offensive to the American culture. Thus, some courts confined the meaning of 'servant' to household servants.").

in offices, or in other impersonal settings such as on railroads. *See, e.g., Bouvier's Law Dictionary* 353 (1926 ed.) ("Usually embraces a laborer, servant, or other person occupied in an inferior position. Not restricted, however, to any particular employment or service. . . . It may be skilled labor or the service of the scientist or professional man as well as servile or unskilled manual labor." (citations omitted)).[7]

As a generic term describing those who worked for wages, "employee" was also a useful term when crafting legislation that regulated modern industry and its labor force. *See, e.g.*, Pub. L. No. 100, § 1, 35 Stat. 65, 65 (1908) (imposing liability on railroad carriers for injuries to their "employee[s]").[8] That phenomenon prompted further development of the word's meaning. *See Black's Law Dictionary* 657 (3d ed. 1933) ("The term is often specially defined by statutes[.]"). And because many of these statutes addressed worker's compensation—where it was important to distinguish independent contractors from workers who had to follow their employers' specific directions—it was natural for

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[7] The dramatic evolution of the American economy during this period helps explain why these qualities of the word "employee" made it such a useful new term. "From the end of Reconstruction until World War I, the United States was transformed from an agrarian, rural nation in which business was conducted primarily by small, locally owned firms, to an urban, industrial economy in which business was dominated by large, nationally based corporations." Deborah A. Ballam, *The Evolution of the Government-Business Relationship in the United States: Colonial Times to Present*, 31 Am. Bus. L.J. 553, 598 (1994).

[8] *See* Carlson, *supra*, at 308-09 ("When legislatures sought a broader or more general coverage" in worker's compensation laws, not limited by occupation or industry, "they had an assortment of vague and uncertain terms from which to choose . . . . Out of all those terms, 'employee' prevailed, if only by default.").

those statutes to use the word "employee" in a manner that incorporated the legal concept of a "servant." *See* Carlson, *supra*, at 306-07.

Eventually the word "employee" came to subsume the word "servant." *See Black's Law Dictionary* 564 (8th ed. 2004) (defining "employee" as "[a] person who works in the service of another person (the employer) under an express or implied contract of hire, *under which the employer has the right to control the details of work performance*" (emphasis added)). And that is generally how "employee" is used in legal contexts today—a term largely defined by being mutually exclusive with the term "independent contractor."

In the early twentieth century, however, this usage had not solidified, and the meaning of "employee" was still in flux. Some authorities used the word consistent with its modern connotations. *See Kinsman v. Hartford Courant Co.*, 108 A. 562, 563 (Conn. 1919) ("Let us ascertain first whether the deceased was an independent contractor or an employé at the time he was injured."). Others used it to cover both servants *and* independent contractors. *See Williams v. Nat'l Cash Reg. Co.*, 164 S.W. 112, 115 (Ky. 1914) ("If the employé is merely subject to the control or direction of the owner or his agent as to the result to be obtained, he is an independent contractor."); *Allen*, 115 P. at 679 (same); 1 *Bouvier's Law Dictionary* 1035 (1914 ed.) ("It may be any one who renders service to another . . . . The servant of a contractor for carrying mail is an employé of the department of the post-office." (citations omitted)). That practice was already diminishing, however. *See General Discussion of the Nature of the Relationship of Employer and Independent Contractor*, § 4, 19 A.L.R. 226 (1922) ("There is some authority for using the word 'employee' in the sense of 'independent contractor.' But it is now so generally treated as a

synonym of 'servant' that this is the only juristic signification which can with propriety be ascribed to it at the present day." (citation omitted)).

As the twentieth century progressed, the modern definition of "employee" steadily gained preeminence, and this evolution can be observed in changes to the word's dictionary definition. As noted, the 1910 edition of *Black's Law Dictionary* contained only a very general definition of the term ("more extensive than 'clerk' or 'officer' . . . . understood to mean some permanent employment or position"). The 1933 edition added new material fleshing out a more precise set of concepts: "a person working for salary or wages; applied to anyone so working, but usually only to clerks, workmen, laborers, etc., and but rarely to the higher officers of a corporation or government or to domestic servants." *Black's Law Dictionary* 657 (3d ed. 1933). But the word still had not firmly crystalized into its modern equivalence with "servant." Thus, the 1933 entry notes that because the word is often specially defined in statutes, "whether one is an employee or not will depend upon particular facts and circumstances even though the relation of master and servant . . . does or does not exist." *Id.*

By the next edition, however, things had changed. New text was added stating simply: "'Servant' is synonymous with 'employee.'" *Black's Law Dictionary* 618 (rev. 4th ed. 1968). And the text stating that one could be an employee "even though the relation of master and servant . . . does or does not exist" was removed. *See id.* at 617-18 ("Generally, when person for whom services are performed has right to control and direct individual who performs services not only as to result to be accomplished by work but also as to details and means by which result is accomplished, individual

subject to direction is an 'employee.'"). The word's modern definition had firmly taken hold.

C. As the word "employee" increased in prevalence over the twentieth century, and crystalized into its present-day meaning, it gradually influenced the way that other *employ*-related words were used. Terms like "employment" would eventually come to be associated specifically with the concept of an employer-employee relationship, which had incorporated the concept of a master-servant relationship. But that shift in meaning came well after Congress enacted the FAA.

In 1910, for instance, *Black's Law Dictionary* provided two definitions of the word "employer." The first was broad enough to encompass any person who engages another to perform work: "One who employs the services of others." The second definition reflects the more specialized concept of someone who pays employees on an ongoing basis for their labor: "one for whom employees work and who pays their wages or salaries." *Black's Law Dictionary* 422 (2d ed. 1910). In the next edition, those same definitions were repeated—but significantly, they were followed by a new description: "The correlative of 'employee.'" *Id.* at 657 (3d ed. 1933). Indicating the burgeoning influence of the term "employee," the word "employer" was now coming to be defined in reference to the employer-employee relationship, not just by its broad, traditional meaning. But, significantly, at this time the meaning of the word "employee" remained very much in flux. Indeed, that same version of *Black's Law Dictionary* used the term "employee" to define "independent contractor." *Id.* at 951 ("If the employee is merely subject to the control or direction of the employer as to the result to be obtained, he is an independent contractor.").

The definition of "employer" in the next edition of *Black's* went a step further in this direction, by adding yet another line: "'Master' is a synonymous term." *Black's Law Dictionary* 618 (rev. 4th ed. 1968). And in today's definition of "employer," the word's transformation is complete: "A person who controls and directs a worker under an express or implied contract of hire and who pays the worker's salary or wages." *Id.* at 565 (8th ed. 2004).

The influence of the word "employee" and the concept of an employer-employee relationship is why "employment" can today be defined as "[t]he relationship between master and servant," *id.* at 566, and why "employment contract" can be defined as "[a] contract between an employer and employee in which the terms and conditions of employment are stated," *id.* at 344.

Indeed, the transformation in how these words are used was sufficiently notable that the editors of the *Oxford English Dictionary* discussed it just a few years ago, in conjunction with the dictionary's most recent updates:

> Modern uses of *employ*, *employee*, and *employment* reflect changes in the world of work. From its earliest occurrences in English in the 1400s, *employ* has had a variety of broader and more specialized meanings to do with using or applying things for a particular purpose. The specific meaning "To use the services of (a person) to undertake a task, carry out work, etc." is first recorded in English in 1523 . . . . Over time this meaning shows an increasingly marked narrowing to "to hire or retain (a person) to do something in return for wages or payment". Recently, it has become clear that the definition of *employ* and related words is being drawn more narrowly and precisely in the

> language of Human Resources and of employment law, and this has begun to have some impact on more general use as well[.]

Philip Durkin, *Release Notes: The Changes in Empathy, Employ, and Empire* (Mar. 13, 2014), https://public.oed.com/blog/march-2014-update-release-notes/.

In 1925, however, the longstanding meanings of "employment," "employer," and "employ" had not yet been transformed by the modern concept of an employer-employee relationship. Those words still had broad and general definitions that did not signify or require a master-servant relationship. *See* Part I, *supra*. And thus the ordinary meaning of the term "contracts of employment" was exactly the one identified by the decision below: "agreements to perform work." J.A. 177.

D. Importantly, "contracts of employment" is the phrase that Congress chose to utilize in Section 1 of the FAA; Congress did not exempt "contracts of employ*ees*." And Congress made the breadth of its purpose doubly clear by applying Section 1 to "any other class of *workers* engaged in foreign or interstate commerce," 9 U.S.C. § 1 (emphasis added), not to "any other class of *employees*." Congress had just used the word "employees" earlier in the same sentence when referring to "railroad employees." Thus, even if Congress intended that use of "employees" to cover only common-law servants (which is doubtful, *see* Resp. Br. 40-42), Congress selected a different and broader word, "workers," to describe the wider class of individuals to whom Section 1's exemption applies. "That is significant because Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)).

New Prime argues that limiting this exemption to modern-day "employees" would have made more sense. Pet'r Br. 28-29. But "[t]he role of this Court is to apply the statute as it is written," regardless of whether "some other approach might accor[d] with good policy." *Burrage v. United States*, 571 U.S. 204, 218 (2014) (quotation marks omitted). And "[b]ecause the [FAA] gives no 'textual indication' that its exemptions should be construed narrowly, 'there is no reason to give [them] anything other than a fair (rather than a "narrow") interpretation.'" *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (quoting Scalia & Garner, *supra*, at 363).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 17-340

In The

Supreme Court of The United States

New Prime, Inc.,

Petitioner,

v.

Dominic Oliveira,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR CUSTOMIZED LOGISTICS AND DELIVERY ASSOCIATION, AS AMICUS CURIAE IN SUPPORT OF PETITIONER.

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I. INTEREST OF THE AMICUS CURIAE[1]

CLDA is a non-profit trade association that advances the interests of the customized logistics and delivery industry through advocacy, networking and education. CLDA's membership includes over 300 first, middle and last mile delivery carriers, and over 3,500 driver members. CLDA's members are the people who transport packages, medical supplies, bulk materials, documents, general freight, and other goods to the home, office and everywhere in between. CLDA members widely use independent owner-operators as a vital component of their business model – either solely or in conjunction with dedicated employee drivers.

This case is of significant interest to CLDA because of the common industry practice of utilizing independent owner-operators to transport cargo. These independent owner-operators are crucial to the structure of many of the carriers' businesses, as they often provide the equipment and services carriers need to meet the changing demands of their businesses. Further, these carriers frequently rely on arbitration provisions in their

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[1] After timely notification, petitioner and respondent consented to the filing of this brief.
Pursuant to Rule 37.6, amicus states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than amicus, its members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

contracts with owner-operators to ensure that both parties have an efficient and cost-effective means through which they can resolve their disputes. The decision below, which applied an overly expansive interpretation of the exception to the Federal Arbitration Act ("FAA"), would render these arbitration agreements unenforceable. That would leave both the carriers and owner-operators subject to the threat of lengthy and costly litigation.

Indeed, without the option of arbitration, the burden of protracted litigation would be too great for many of CLDA's members. The largest segment of CLDA's membership consists of small operators with between one and fifty drivers, and annual revenues of less than one million dollars. Arbitration provides these small businesses a forum in which they can fairly, and affordably, resolve disputes between themselves and the other businesses with which they contract. These businesses do not have the resources to carry on lengthy and expensive lawsuits in civil court, and will often be forced to settle their disputes, regardless of the merits of the case, to avoid protracted litigation.

Further, many of CLDA's members are the owner-operators themselves, who also rely on the protections of arbitration provisions contained within their independent contractor agreements. Like carriers with which they contract, these owner-operators benefit from an efficient, streamlined dispute resolution process.

These CLDA members have relied on the precedent of this Court strongly favoring arbitration, and the decisions from other circuits, which have interpreted the exception to the FAA to be inapplicable to independent contractor agreements. If the benefit of the FAA is denied these members, many will face the threat of expensive and protracted class action litigation. For these small businesses, a class action in state or federal court forces them either to settle out of fear or "bet the company" on ruinous litigation. The option of arbitration gives them a third option: quicker and less costly resolution of disputes.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the FAA in response to "widespread judicial hostility" towards the enforcement of arbitration agreements, and it reflects a "liberal federal policy favoring arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Consistent with this policy, the FAA broadly governs any "contract evidencing a transaction involving commerce," subject to a single exception in Section 1 of the Act carving out "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. §§ 1, 2. And as this Court has declared, even this exception must be given "a narrow construction" in light of the FAA's pro-arbitration purpose. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001).

Applying this logic to the plain language of the FAA, federal courts in various circuits have traditionally held that the Section 1 exception only carves out contracts between employers in the transportation industry and their employees, and not agreements with independent contractors. *See, e.g., In re Swift Transp. Co.*, 830 F.3d 913 (9th Cir. 2016)("*Van Dusen III*"); *Doe v. Swift Transp. Co.*, 2015 WL 274092, at *3 (D. Ariz. Jan. 22, 2015); *Aviles v. Quik Pick Express, LLC*, 2015 WL 5601824, at *6 (C.D. Cal. Sept. 23, 2015); *Diaz v. Mich. Logistics, Inc.*, 2016 WL 866330, at *4 (E.D.N.Y. Mar. 1, 2016); *Morning Star Assocs., Inc. v. Unishippers Global Logistics, LLC*, 2015 WL 2408477, at *5 (S.D. Ga. May 20, 2015); *Carney v. JNJ Exp., Inc.*, 10 F. Supp. 3d 848, 852 (W.D. Tenn. 2014); *Port Drivers Fed. 18, Inc. v. All Saints*, 757 F. Supp. 2d 463 (D.N.J. 2011); *Davis v. Larson Moving & Storage Co.*, 2008 WL 4755835, at *4 (D. Minn. Oct. 27, 2008); *Owner-Operator Indep. Drivers Ass'n v. United Van Lines, LLC*, 2006 WL 5003366, at *3 (E.D. Mo. Nov. 15, 2006); *Roadway Package Sys., Inc. v. Kayser*, 1999 WL 817724, at *4 n.4 (E.D. Pa. Oct. 13, 1999). The First Circuit is now a lone outlier on the scope of the Section 1 exemption.

The decision below not only conflicts with the holdings of other federal courts, it directly conflicts with the central goal of the FAA: to ensure that arbitration agreements between contracting parties are enforceable by the parties, thereby safeguarding each party's access to an efficient and cost-effective alternative to litigation. Indeed, as this Court has recognized, "[t]he FAA's overarching purpose is to ensure the enforcement of arbitration agreements

according to their terms so as to facilitate informal, streamlined proceedings." *AT&T Mobility LLC*, 563 U.S. at 334 (2011). The First Circuit's expansive interpretation of the Section 1 exclusion would nullify arbitration agreements between delivery carriers and the independent contractors they rely upon. This would undermine the federal policy favoring arbitration, and unfairly deprive both groups of the FAA's assurance that they will have access to an informal and streamlined process.

As this Court has recognized, arbitration provides several distinct and important advantages over litigation, including an expedited process, cost-efficiency, informality, and confidentiality. These advantages are crucial in preserving the resources of the parties who have entered into arbitration agreements, in particular the smaller businesses and owner-operators who lack the resources to survive protracted litigation, especially class actions. The importance of arbitration to these groups cannot be overstated. As this Court has observed, "arbitration's advantages often would seem helpful to individuals . . . who need a less expensive alternative to litigation." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995).

Additionally, there is no public policy interest that would be served by the First Circuit's expansive interpretation of the Section 1 exclusion. Arbitration has proven to be a fair and equitable alternative to court litigation. Claimants succeed in arbitration at roughly the same rate as plaintiffs in court. Further, the amounts of the awards recovered in arbitration are comparable to those recovered by

successful plaintiffs following a jury trial. It is also important to note that in arbitration, both parties are more likely to have their "day in court," as opposed to litigation, where employment cases rarely make it to trial.

Finally, as Petitioner forcefully argues in its Brief, CLDA agrees that courts should not look beyond the terms of a contract to determine whether it is a "contract of employment" within the meaning of the Section 1 exception. Doing otherwise, such as by conducting mini-trials to determine the legal relationship between the parties, would contravene the plain language of the FAA, which singularly focuses on the nature of the parties' contract, not the nuances of the relationship between the parties. Moreover, looking beyond the four corners of the agreement would force the parties to litigate their dispute (and often decide the ultimate question at issue – the plaintiff's legal status) even before they reach the arbitral forum. This would frustrate the purpose of the FAA, and cut against the federal policy favoring arbitration.

III. ARGUMENT

A. The Federal Policy Favoring Arbitration Was Developed to Ensure Parties to a Contract Have Access to Efficient Dispute Resolution

If affirmed, the First Circuit's expansive interpretation of the Section 1 exclusion would strip carriers and owner-operators of the FAA's assurance that their otherwise valid arbitration agreements

will be enforced. This would seriously undermine the Congressional policy favoring arbitration by carving out from the coverage of the FAA a vast swath of business to business contracts having nothing to do with "employment" relationships – as the term is universally understood – of any kind. Motor carriers of all kinds, including many owner-operators and other small transportation businesses, will no longer be able to count on arbitration as a lower-cost, more efficient alternative to litigation. As a consequence, rather than preventing the disruption of the flow of goods in interstate commerce (Section 1's surmised purpose), the exclusion will leave these parties facing the specter of protracted and expensive litigation, which is guaranteed to disrupt – and sometimes end – their entire operations.

The Section 1 exclusion to the FAA was not intended to restrict the ability of two independent businesses to adopt an inexpensive dispute resolution alternative to litigation. Contracts between business operators are entirely different than employer-employee relationships. Generally, an employer holds greater bargaining power than an employee. In the motor carrier context, contracts are between parties that are not dependent on one another. When two such business operators enter into a contract, they are on equal footing. As this Court has noted:

> "Demand for a motor carrier's services may fluctuate seasonally or day by day. Keeping expensive equipment operating at capacity, and avoiding the waste of resources attendant upon empty backruns and idleness, are

> necessary and continuing objectives. It is natural, therefore, that a carrier that finds itself short of equipment necessary to meet an immediate demand will seek the use of a vehicle not then required by another carrier for its operations, and the latter will be pleased to accommodate. *Each is thereby advantaged.*"

Transamerican Freight Lines, Inc. v. Brada Miller Freight Sys., Inc., 423 U.S. 28 (1975)(emphasis added). It is difficult to imagine that the Section 1 exclusion was included to restrict two independent businesses, which signed a contract at arms-length. This would severely frustrate the liberal policy favoring arbitration.

Transportation businesses, including carriers and those with which they contract as independent contractors, should therefore be entitled to avoid the burdens of litigation by mutually agreeing to arbitrate disputes. Holding otherwise would achieve no benefit and, instead, undermine the FAA's very purpose "to facilitate informal, streamlined proceedings," *AT&T Mobility LLC*, 563 U.S. at 334 (2011).

1. Arbitration Is a Cost-Effective and Efficient Alternative to Litigation

The trucking industry is a competitive market for both carriers and owner-operators. Every business must operate on slim margins to keep prices reasonable. This atmosphere requires trucking firms, big or small, to operate in the most efficient

manner possible. Arbitration is a key tool used by many transportation businesses to achieve this goal. Arbitration provides carriers and owner-operators alike with a cost-effective, efficient forum for dispute resolution, allowing them to avoid the lengthy and expensive burdens of litigation. It is precisely these advantages that Congress sought to promote in adopting the FAA. "The FAA's overarching purpose is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings." *AT&T Mobility LLC*, 563 U.S. at 334 (2011).

Congress has recognized the efficiencies and advantages of arbitration:

> "The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices ..."

H.R.Rep. No. 97-542, p. 13 (1982). This Court has echoed the sentiments of Congress in recognizing the value of arbitration in several of its decisions. *See Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010)("parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes"); *Circuit City*, 532 U.S. at 107

(2001)("there are real benefits to arbitration in the employment context, including avoidance of litigation costs.")

With respect to the total length of time to complete the process, the value of arbitration has been clearly demonstrated. In the context of claims arising from employment disputes, an average arbitration moves through final hearing more than a year faster than a case litigated in court. Arbitration is nearly two years faster when there is an appeal. Roy Weinstein, Cullen Edes, Joe Hale and Nels Pearsall, Micronomic Research and Consulting, *Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings* 14 (2017)(finding that the median time for cases to make it through trial in U.S. District Courts was 24.2 months and the median time to complete arbitration was just 11.6 months).

Delays in dispute resolution force litigants to set aside resources: 1) in anticipation of the costs of litigation, and 2) to budget for a possible award. The uncertainty and longer duration of the court litigation process makes it difficult to estimate the total costs, making litigants less willing to take the risk. This is particularly harmful to small businesses, which have limited resources, and may be unable, or unwilling, to expand their businesses until the cloud of litigation passes. It is estimated that lost opportunity costs for companies are over $2 billion dollars per year when companies are exposed to court litigation compared to arbitration. *Id.* at 18.

The direct costs of litigation are even more staggering. The initial filing fees for arbitration admittedly can equal or exceed the costs of filing a case in court. After that, though, the costs of court litigation quickly outstrip arbitration, once attorney's fees, the costs of discovery, payment of court reporters and expert witnesses begin to mount. Seth Lipner, *Is Arbitration Really Cheaper?*, Forbes (Jul. 14, 2009), https://www.forbes.com/2009/07/14/lipner-arbitration-litigation-intelligent-investing-cost.html#15043f174ed1. It is estimated that the average cost of litigation is *three to four times higher* than the cost of arbitration. Nat'l Arbitration Forum, Business-to-Business Mediation/Arbitration vs. Litigation 2 (2005).

Given the high costs of litigation, all parties to an arbitration agreement benefit from the availability of a cheaper alternate forum. If a dispute arises involving a small sum of money, the aggrieved party may be hesitant to attempt to recover the disputed sum when faced with the hurdles and costs of litigation. However, "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance [when a case] involves smaller sums of money." *Circuit City*. 532 U.S. at 123 (2001).

Perhaps the biggest advantage of arbitration is the unpredictability of jury verdicts in business-related disputes. Indeed, the factor that most motivates small businesses to choose arbitration is the fear of an excessive or emotionally driven jury award that may include large awards for punitive

damages and emotional distress. *See* Rand Institute for Civil Justice, *Business to Business Arbitration in the United States, Perceptions of Corporate Counsel* ("Rand") 30 (2011)(finding that seventy-five percent of people consider the threat of an excessive jury award as an important factor that favors arbitration). The unpredictability of jury awards, and the fear that a jury may award excessive damages, often forces small businesses into pretrial settlement. Martha Halvordson, *Employment Arbitration: A Closer Look*, 64 J. Mo. B. 174, 178 (2008).

For motor carriers and owner-operators, speed of resolution and preservation of financial resources are vital business considerations. Arbitration provides motor carriers and owner-operators a forum in which they can resolve their disputes with less disruption – both in time and money – to their respective businesses. This is especially important to small carriers and independent owner-operators, for whom many disputes involve a small sum of money. The fundamental purpose of the FAA is to provide an alternative forum in which the drawbacks of litigation – delay and cost – can be minimized.

2. Arbitration Provides Both Parties with a Fair Opportunity to Have Their Day in Court

While the efficiency and cost-effectiveness of arbitration may be its most apparent advantages, arbitration also provides both parties with a greater opportunity to have their "day in court." No party is at a disadvantage in arbitration, and both parties

reap the benefits of an expedited, efficient process.

It is a common misconception that claimants are disadvantaged in arbitration proceedings. Several studies have demonstrated that claimants in employment disputes succeed on their claims in arbitration at least as often as plaintiffs succeed at trial. *See* Michael Delikat and Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, Disp. Resol. J., November 2003-January 2004, at 58 (finding that claimants in arbitration win at a rate of forty-six percent of the time compared to plaintiffs in federal court who won only in thirty-four percent of cases); Theodore Eisenberg and Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 Disp. Resol. J., Nov 2003-Jan 2004 at 44 (finding "no statistically significant differences between employee win rates" in cases in arbitration compared to cases that are litigated in court); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 46 (1998)(claimants won in sixty-three percent of claims that were arbitrated).

Studies further demonstrate that successful claimants in arbitration fare as well as successful plaintiffs in Court litigation when it comes to recovery. In fact, the median awards for claimants in arbitration arising out of employment disputes have been shown to be equal to, or higher than, the median jury award in court. *Id.* at 50 (median award in non-civil-rights employment disputes of $95,000 was higher than the median award of

$69,000 in court cases); Delikat and Kleiner, *supra*, at 58 ("[w]hen a claimant does get to have a trial, we found that the median monetary recovery is fairly comparable to the amount received in arbitration").

Claimants enjoy win rates and awards in arbitration that are comparable to those they could anticipate in court. At the same time, they get quicker results at less cost. Thus, it is unsurprising that a high number of participants in arbitration have expressed satisfaction with the fairness of the process and outcome. *See* Harris Interactive, *Arbitration: Simpler, Cheaper, and Faster Than Litigation* 24 (2005) (finding that seventy-five percent of participants in arbitration were satisfied with the fairness of the process compared to twenty percent who were not satisfied).

In addition to comparable – if not better – outcomes for claimants, arbitration is also more likely to provide the parties their "day in court." The long process of litigation is expensive and contains many obstacles. This prevents the large majority of cases from ever reaching trial. Indeed, less than three percent of civil cases are tried, and less than one percent of civil case dispositions are jury trials. John Barkai, Elizabeth Kent, and Pamela Martin, *A Profile of Settlement*, 42 Court Review: The Journal of the American Judges Association 34 (2006). There are a number of plausible explanations for this. As discussed above, the high costs of litigation (and/or the attendant harmful publicity) may force a party into a settlement, without having an opportunity to be heard. Alternatively, a court may end the litigation on a party's dispositive motion, such as a

motion for summary judgment, which is generally not available in arbitration. In arbitration, however, about one-third of cases reach a final hearing. *See* Eisenberg and Hill, *supra*, at 52. (showing that roughly one-third of employment arbitrations filed reached a final award). Arbitration provides parties with a greater opportunity to get a actual decision resolving their dispute.

Ultimately, arbitration has continued to grow as an alternative to litigation because it works. Neither party is at a disadvantage in arbitration, as demonstrated by the comparable success rates and monetary awards between claimants in arbitration and plaintiffs in court. Further, both parties have an opportunity to be heard on the merits, rather than settling out of fear, or declining to even bring an action because the intimidating nature of the litigation process outweighs the value of the potential award.

B. Courts Should Not Look Beyond the Terms of the Contract to Determine Whether It Falls Within the Section 1 Exclusion

As noted above, the benefits that arbitration provides to motor carriers and owner-operators can be crucial to the continued viability of their businesses. But for any party to reap the benefits of an agreement to arbitrate, it must: 1) have confidence the contract will be enforced, and 2) not be required to drain resources litigating the merits of its case before even reaching the arbitral forum.

In order to achieve these goals, the determination of "whether a contract qualifies as a 'contract of employment'" within the meaning of Section 1 of the FAA "requires a categorical approach that focuses solely on the words of the contract." *In re Swift Transportation Co. Inc.*, 830 F.3d 913, 920 (9th Cir. 2016)(Ikuta, J., dissenting). Courts should not be allowed to make factual determinations regarding the employment relationship of the contracting parties for two reasons. First, to do so deprives the parties of the benefits of arbitration by forcing the parties to expend valuable resources in a preliminary court battle. Second, a threshold factual determination means that the parties must essentially litigate the merits of the case. This in turn creates uncertainty as to the enforceability of the contract at execution.

If a court looks beyond the terms of the contract to determine if an employment relationship exists under law (not under the contract), the court will have to make factual determinations. This could potentially require extensive discovery including depositions, productions of documents, testimony of witnesses, hearings, etc. Forcing parties to expend resources to engage in this type of litigation undermines the purpose of the FAA, which is to to "facilitate informal, streamlined proceedings." *AT&T Mobility LLC*, 563 U.S. at 334 (2011). By requiring the parties to litigate their dispute, at the outset, the carriers and owner-operators are robbed of the cost and efficiency benefits that they hoped to achieve through arbitration.

This would also lead to inconsistency. Once a court chooses to look beyond the terms of the contract, it is unclear how far the court should go. One court may decide the issue solely on a review of all business documents. A second court might require sworn declarations from the parties. And a third court could order discovery, followed by live testimony (essentially, a mini-trial on the ultimate issue to be decided in the case). None of this is consistent with the purposes of the FAA. By requiring that courts look only to the terms of the contract, this Court would establish uniformity. Trial courts would then focus on the nature of the contract and credit the intent of the parties, as memorialized in the written agreement.

It has long been the rule of this Court that "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). The reasoning behind this rule is to respect the agreement of the parties to have the arbitrator decide the ultimate issue. *Id.* In a misclassification suit, it is often the case that the key issue – if not the only issue – to be resolved is the nature of the parties relationship (i.e., employment or independent contractor). Deciding this question at the outset of a case, even if only for a limited purpose or under a slightly different legal standard, greatly infringes on the parties' right to have an arbitrator decide the issue, and to do so against a clean tableau untainted by a court's findings on a limited record prior to full discovery. Indeed, "by requiring the parties to litigate the

underlying substance" of their claims the "court risks depriving [the parties] of the benefits of [their] contract." *In re Swift Transportation Co. Inc.*, 830 F.3d at 920 (Ikuta, J., dissenting).

Additionally, many misclassification cases present factual scenarios "where it is difficult to determine whether a party is an employee or an independent contractor." *N.L.R.B. v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968). This difficulty would inevitably lead to unpredictable and inconsistent outcomes if courts are required to resolve the questions on limited evidence. Even cases involving the same contracts and similar facts could result in different outcomes. In contrast, if courts do not look beyond the four corners of the contract, the parties could reasonably anticipate the outcome, and take steps to ensure that they have an enforceable contract at the time the contract is executed.

In order to provide the carriers and owner-operators a level of certainty that their contract will be enforced, as well as to ensure that the parties are able to enjoy the benefits of arbitration, "contracts of employment" must only be determined by the terms of the contract.

IV. CONCLUSION

The issue presented here is of grave concern to the carriers and owner-operators who comprise the CLDA. For the foregoing reasons, and those stated in the Petitioner's brief, the judgment of the Court of Appeals should be reversed.

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No. 17-340

IN THE

Supreme Court of the United States

NEW PRIME, INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF BY EMPLOYMENT LAW SCHOLARS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE

Amici are 35 law professors who have taught and written about employment law.[1] They are listed in the Appendix to the brief. They submit this brief because they believe that the Federal Arbitration Act ("FAA") should be construed consistent with how all other statutes and related case law treat issues of worker status. Amici take no position on other issues raised in the underlying proceedings or that might be addressed on remand from this Court's decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner New Prime, Inc. ("Prime") and its amici ask this Court to interpret "contracts of employment" as used in the FAA based solely on the labels used in particular contracts, drawing distinctions between independent contractors and employees where there is no sound basis to do so. There are many statutes and regulations that do not divide workers based on the common law concepts of employees and independent contractors. For those statutes that do draw such lines, the

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[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for a party authored its amici brief in whole or in part and no person or entity, other than amici or their counsel, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Rule 37.3(a), amici state that counsel of record for each party has consented to the filing of this brief.

The law professors are signing this brief in their personal capacity and not on behalf of their institutions.

determination of whether a worker is an employee or independent contractor is based on the facts of the working relationship and not simply on whatever labels are used by the parties in a contract. No statute is interpreted in the superficial, form-over-substance way that Prime advocates. Adopting this approach would lead to absurd and pernicious consequences.

That the FAA uses the phrase "contracts of employment of . . . any other class of workers engaged in foreign or interstate commerce" is not in itself proof that Congress intended to import the common law employee/independent contractor distinction to define the scope of FAA coverage. 9 U.S.C. § 1. The First Circuit correctly concluded that the FAA does not draw lines between employees and independent contractors, finding that such a distinction would be a "strange one for Congress to draw" because both independent contractors and employees in the transportation industry perform the same role in the "free flow of goods" that animated the transportation worker exemption under the FAA. The First Circuit's analysis of the FAA is consistent with a number of statutory and regulatory regimes that do not distinguish between independent contractors and employees. Notably, due to abuses in classifying commercial truckers as independent contractors, laws regulating the commercial trucking industry do not distinguish between employees and independent contractors.

Even when statutes call for a distinction between employees and independent contractors, courts do not draw that distinction by simply viewing the face of a contract. Rather, courts determine worker status under federal employment

statutes by examining all relevant aspects of the working relationship. This longstanding approach further supports the conclusion that the FAA's exemption applies regardless of worker status. That is, determining worker status requires a review of the totality of the circumstances, an inquiry that requires discovery beyond the face of a contract. Should this Court hold that the FAA's transportation worker exemption depends on the worker's status as either an independent contractor or employee, the Court must not allow the distinction to be determined by contract.

Allowing worker status to be decided by contract would set the FAA apart from every other federal statute governing workers. It would lead to inconsistency and uncertainty in the workplace because worker status would vary based on contract or the label chosen for each worker. It would allow companies to unilaterally decide whether their workers are protected by the law. The danger in such an approach is particularly real in the context of the underlying wage statute in this case, the Fair Labor Standards Act ("FLSA"), which was designed to prevent parties from contracting away employees' rights to minimum wages and overtime compensation. This Court must not, through the FAA, endorse this type of race to the bottom.

ARGUMENT

I. Many Federal and State Statutory Schemes Do Not Distinguish Between Common Law Employees and Independent Contractors.

The First Circuit held that the FAA does not draw lines based on common law conceptions of

employees and independent contractors, finding that Congress, through the FAA's exemption for transportation workers,[2] "'demonstrated concern with transportation workers and their necessary role in the free flow of goods' at the time when it enacted the FAA." *Oliveira v. New Prime, Inc.*, 857 F.3d 7, 22 (1st Cir. 2017) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 (2001)). The court concluded that a "distinction . . . based on the precise employment status of the transportation worker would have been a strange one for Congress to draw: Both individuals who are independent contractors performing transportation work and employees performing that same work play the same necessary role in the free flow of goods." *Id.* at 22.

Employment statutes and regulations cover a diverse array of work-related activities, and each statute or regulation needs to be considered within the context in which it was enacted. Given the background of the FAA, the First Circuit's interpretation that the FAA does not differentiate between common law employees and independent contractors is far from unusual.

Significantly, laws and regulations governing the commercial trucking industry often do not delineate between employees and independent contractors. *See, e.g.*, 49 C.F.R. § 390.5T (defining "employee" to include "a driver of a commercial motor vehicle (including an independent contractor

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[2] The exemption provides "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.

while in the course of operating a commercial motor vehicle), a mechanic, and a freight handler"); 49 U.S.C. § 31101(2) (defining "employee" in Commercial Motor Vehicle Safety Act as "a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle"); Neb. Rev. Stat. Ann. § 75-362(12) (stating similar); S.C. Code Ann. Regs. 38-390.5 (stating similar); Ill. Admin. Code tit. 92, § 390.1020 (stating similar); 4 Colo. Code Regs. § 723-6:6001 ("'Driver' means any person driving a motor vehicle, including an independent contractor").

The reason that these laws do not differentiate between employees and independent contractors is because "[m]otor carriers had attempted to immunize themselves from the negligence of the drivers who operated their vehicles by making them all nominally 'independent contractors.'" *White v. Excalibur Ins. Co.*, 599 F.2d 50, 52 (5th Cir. 1979). "In order to protect the public from the tortious conduct of the often judgment-proof truck-lessor operators, Congress . . . require[d] interstate motor carriers to assume full direction and control of the vehicles that they leased as if they were the owners of such vehicles." *Morris v. JTM Materials, Inc.*, 78 S.W.3d 28, 38 (Tex. App. 2002) (internal quotation marks omitted); *see also Perry v. Harco Nat. Ins. Co.*, 129 F.3d 1072, 1074 (9th Cir. 1997) ("[O]ne purpose [of the Motor Carrier Safety Act] is to protect members of the public from motor carriers' attempts to escape liability for the negligence of drivers by claiming their drivers were independent contractors."). Thus, in federal and state statutes and regulations governing commercial trucking, there is no meaningful

distinction between independent contractors and common law employees.

Provisions regulating the trucking industry are not the only laws that do not distinguish between common law employees and independent contractors. For instance, the Department of Energy's ("DOE") regulations regarding its chronic beryllium disease prevention program define the term "worker" to mean "a person who performs work for or on behalf of DOE, including a DOE employee, an independent contractor, a DOE contractor or subcontractor employee, or any other person who performs work at a DOE facility." 10 C.F.R. § 850.03. Likewise, the Transportation Security Administration's Flight School Security Awareness training regulations enacted after the 9/11 terrorist attack define "flight school employee" as "a flight or ground instructor . . .; a chief instructor . . . .; a director of training . . . .; or any other persons employed by a flight school, including an independent contractor, who has direct contact with a flight school student." 49 C.F.R. § 1552.21.

State statutes as well do not distinguish between contractors and employees where it does not make sense to do so. For example, Minnesota's Drug and Alcohol Testing in the Workplace statute defines "Employee" as "a person, independent contractor, or person working for an independent contractor who performs services for compensation, in whatever form, for an employer." Minn. Stat. § 181.950, subd. 6. North Dakota has enacted a check fraud statute which renders an employer responsible for fraudulent endorsements of its "employee[s]," which include "an independent contractor and employee of an independent contractor employed by the employer." N.D. Cent.

Code Ann. § 41-03-42(1)(a). There are numerous other examples of state statutes that do not distinguish between employees and independent contractors in varied contexts. *See, e.g.*, Me. Rev. Stat. tit. 24-A, § 2174-A (defining "public works employee" to include "an independent contractor or employee of an independent contractor"); Tenn. Code Ann. § 7-51-1102 (defining an "employee" as "a person who performs any service on the premises of an adult-oriented establishment on a full-time, part-time, or contract basis, whether or not the person is denominated an employee, independent contractor, agent or otherwise, and whether or not such person is paid a salary, wage, or other compensation by the operator of such business" in statute governing adult entertainment); Nev. Rev. Stat. § 33.210 (defining "employee" as "a person who is employed by an employer, including, without limitation, an independent contractor" in statute defining scope of orders for protection involving workplace harassment).

As shown above, not every statutory scheme that regulates employment draws the same lines and distinctions as the common law. That the FAA uses the phrase "contracts of employment of . . . any other class of workers engaged in foreign or interstate commerce" is not in itself proof that Congress intended to import the common law employee/independent contractor distinction to define the scope of FAA coverage.

II. The Reality of the Working Relationship, Not the Face of the Contract, Determines Worker Status Under Federal Employment Statutes.

Should this Court find that the FAA's exemption applies only to employees, employee status cannot be determined by simply looking at the label the employer chose or contract the parties signed. There is no federal law that permits employers to decide for themselves—through contract or label—whether their workers are protected by statute.

It is settled law that the label placed on a working relationship does not define the legal obligations that flow from it. If this were otherwise, businesses could use contracts as "get-out-of-jail-free" cards to avoid most employment laws. And, in the context of an employee seeking a job, businesses could withhold gainful work opportunities unless the applicants submit to "independent contractor agreements." Even in rare situations where applicants have true bargaining power, allowing workers to choose their status would result in inconsistency in the workplace and uncertainty for businesses that want to know their obligations across job categories.

Neither sound policy nor case law permits these results. Rather, when considering worker status under a wide variety of employment laws, courts look beyond labels or contracts and examine the facts of each case. Yet, Prime seeks to make the FAA the exception that overrides established law and sound policy. Under Prime's view, the FAA would be the only statute where contractual labels are dispositive of employment status.

Nationwide Mut. Ins. Co. v. Darden and its progeny illustrate this point. 503 U.S. 318 (1992). In *Darden*, this Court looked to traditional agency law criteria to determine worker status under the Employee Retirement Income Security Act ("ERISA"). *Id.* at 323–24. This Court pointed out the flaws inherent in the Fourth Circuit's approach of examining subjective beliefs to determine worker status, explaining that doing so could lead to different results for workers who are otherwise factually the same. *Id.* at 327 ("Because, for example, Darden failed to make much independent provision for his retirement, he satisfied the 'reliance' prong of the Fourth Circuit's test . . . , whereas a more provident colleague who signed exactly the same contracts, but saved for a rainy day, might not." (internal citations omitted)).

Indeed, allowing each company or worker to choose which label to apply to any given working relationship creates inconsistencies in the protections afforded to workers who perform the same job. It also inhibits companies' abilities to "figure out who their employees are" without inquiring into each worker's chosen or designated status. *Id.* (internal quotation marks omitted). Even in the more likely scenario where companies hold all of the bargaining chips, they should not be allowed to choose a worker's status by simply putting labels in contracts because there would be no guarantee that the labels they chose would reflect the actual realities of the working relationship. Accordingly, in determining worker status under ERISA in *Darden*, this Court adopted

the multi-factor common law agency test[3] and explained that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.* at 324 (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968) (internal quotation marks omitted)).

Relying on *Darden*, courts acknowledge that multiple factors must be considered to determine worker status under other employment statutes. *See, e.g., Absolute Roofing & Constr., Inc. v. Sec'y of Labor*, 580 F. App'x 357, 361–63 (6th Cir. 2014) (examining *Darden* factors when reviewing worker status determination in Occupational Safety and Health Administration proceeding); *Glascock v. Linn Cty. Emergency Med., PC*, 698 F.3d 695, 698 (8th Cir. 2012) (Title VII of the Civil Rights Act); *Alberty-Vélez v. Corporación de Puerto Rico Para La Difusión Pública*, 361 F.3d 1, 6–11 (1st Cir.

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[3] In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323–34 (quoting *Cmty for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989)).

2004) (same); *Cilecek v. Inova Health Sys. Servs.*, 115 F.3d 256, 258–60 (4th Cir. 1997) (same); *Weary v. Cochran*, 377 F.3d 522, 525–28 (6th Cir. 2004) (Age Discrimination in Employment Act ("ADEA")); *Frankel v. Bally, Inc.*, 987 F.2d 86, 90–91 (2d Cir. 1993) ("[T]he corporate form under which a plaintiff does business is not dispositive in a determination of whether an individual is an employee or an independent contractor within the meaning of the ADEA."); *see also Crew One Prods., Inc. v. NLRB*, 811 F.3d 1305, 1309–14 (11th Cir. 2016) (looking at multiple factors relating to common law agency for claims under National Labor Relations Act ("NLRA")); *Alexander v. Avera St. Luke's Hosp.*, 768 F.3d 756, 763–64 (8th Cir. 2014) (applying a hybrid of the common law and economic realities tests under the Family Medical Leave Act); *Herald Co. v. NLRB*, 444 F.2d 430 (2d Cir. 1971) (examining the "factual background of the relationship . . . in order to assess 'the total factual context . . . in light of the pertinent common-law agency principles'" in NLRA case (quoting *United Ins. Co.*, 390 U.S. at 258)).

Likewise, in the context of the Americans with Disabilities Act ("ADA"), this Court has acknowledged that multiple factors focusing on the "common-law touchstone of control" guide the inquiry into worker status. *Clackamas Gastroenterology Assocs., P. C. v. Wells*, 538 U.S. 440, 449 (2003).[4] Even under statutes that merely

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[4] We are persuaded by the EEOC's focus on the common-law touchstone of control . . . and specifically by its submission that each of the following six factors is relevant to the inquiry whether a shareholder-director is an employee: Whether the organization can hire or fire the

touch on employment matters, this Court and others have taken a multi-factor approach. *See, e.g.*, *Reid*, 490 U.S. at 751–52 (1989) (examining various factors to determine whether a hired party is an employee under the general common law of agency for the purposes of copyright); *Peno Trucking, Inc. v. Comm'r.*, 296 F. App'x 449, 456 (6th Cir. 2008) (explaining that, for the purposes of FICA taxes, the "usual common law rules applicable in determining the employer-employee relationship" apply and going on to examine multiple factors).

That reality and not contractual labels dictate worker status is all the more significant given that this case was brought under the FLSA. On at least six different occasions over the past seventy years, this Court has unambiguously confirmed that FLSA rights do not cede to contract. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729–30 (1947) ("Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the

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> individual or set the rules and regulations of the individual's work[;] Whether and, if so, to what extent the organization supervises the individual's work[;] Whether the individual reports to someone higher in the organization[;] Whether and, if so, to what extent the individual is able to influence the organization[;] Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts[;] Whether the individual shares in the profits, losses, and liabilities of the organization.

Clackamas, 538 U.S. at 449–50 (quoting EEOC Compliance Manual § 605:0009) (internal citations, quotation marks, and footnotes omitted).

worker from the protection of the Act.") (independent contractor misclassification case); *see also Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985) ("[T]he purposes of the Act require that it be applied even to those who would decline its protections."); *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981); *D.A. Schulte, Inc., v. Gangi*, 328 U.S. 108, 116 (1946); *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161, 167 (1945); *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 602–03 (1944).

Accordingly, courts uniformly reject the contractual labels used by or the subjective intent of the parties as dispositive in wage cases like this one. Courts instead look at the totality of the circumstances guided by a variety of factors to determine the "economic realities" of the working relationship, i.e., whether a worker is an employee or truly in business *for himself*.[5] *See, e.g., McFeeley v. Jackson St. Entm't, LLC*, 825 F.3d 235, 241 (4th Cir. 2016) (holding workers to be employees under the FLSA despite their having signed independent

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[5] Courts have adopted various formulations of the economic realities test, but the test generally focuses on six factors: (1) the nature and degree of the alleged employer's control as to the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of workers; (4) whether the service rendered requires a special skill; (5) the degree of permanency and duration of the working relationship; (6) the extent to which the service rendered is an integral part of the alleged employer's business.

contractor agreements: "The dueling depictions serve to remind us that the employee/independent contractor distinction is not a bright line but a spectrum, and that courts must struggle with matters of degree rather than issue categorical pronouncements."); *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 290 (7th Cir. 2016) ("[S]tatus as an employee for purposes of the FLSA depends on the totality of circumstances rather than on any technical label[.]") (internal citations and quotation marks omitted); *Safarian v. Am. DG Energy Inc.*, 622 F. App'x 149, 151 (3d Cir. 2015) ("[T]he [question of misclassification] arises *because* the parties structured the relationship as an independent contractor, but the caselaw counsels that, for purposes of the worker's rights under the FLSA, we must look beyond the structure to the economic realities."); *Chapman v. A.S.U.I. Healthcare & Dev. Ctr.*, 562 F. App'x 182, 184 (5th Cir. 2014); *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1311 (11th Cir. 2013); *Morrison v. Int'l Programs Consortium, Inc.*, 253 F.3d 5, 11 (D.C. Cir. 2001); *Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998); *Imars v. Contractors Mfg. Servs., Inc.*, 165 F.3d 27, 1998 WL 598778 (6th Cir. 1998) (unreported table decision); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 755 (9th Cir. 1979) ("[T]he subjective intent of the parties to a labor contract cannot override the economic realities . . . .").

The legal principle eschewing contractual manipulation of the FLSA is sound. The FLSA was designed to address unequal bargaining power between employers and employees and prevent the type of private contracts that could result in

substandard wages or excessive work hours.[6] Allowing such contracts promotes a "race to the bottom," wherein employers who misclassify and fail to properly pay employees can undercut competitors by lowering labor costs.[7] In other words, "[m]isclassification . . . hurts law-abiding employers who play by the rules but are under-bid by their competitors."[8] Under-bidding harms the marketplace and frustrates Congress's intent by preventing any uniform standard of rights. As this Court explained:

> The Fair Labor Standards Act was not designed to codify or perpetuate [industry] customs and contracts . . . . Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage

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[6] *See* Anna P. Prakash and Brittany B. Skemp, *Beyond the Minimum Wage: How the Fair Labor Standards Act's Broad Social and Economic Protections Support Its Application to Workers Who Earn a Substantial Income*, 30 ABA J. Lab. & Emp. L. 367, 383 (2015).

[7] *Id.*

[8] Nat'l Emp't Law Project (NELP), *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, Fact Sheet (Sept. 2017), *available at* https://s27147.pcdn.co/wp-content/uploads/NELP-independent-contractors-cost-2017.pdf.

> requirements, cannot be utilized to deprive employees of their statutory rights.

Barrentine, 450 U.S. at 741 (quoting *Tenn. Coal*, 321 U.S. at 602–03); *accord Imars*, 1998 WL 598778, at *5 ("We agree that it makes very good sense to reject contractual intention as a dispositive consideration in our analysis . . . . This is true even when the bargaining is done at arm's length. The FLSA does not just purport to protect weakly-positioned employees from their employers. It also prevents employers from contracting with more productive employees [ ] to the detriment of less productive ones.") (internal citations and quotation marks omitted).

Against this backdrop, Prime's proposed standard becomes all the more exceptional. Viewing only the face of a contract and the labels therein to determine a worker's status under the FAA would make the FAA stand alone and in sharp contrast to the purpose of the substantive statute underlying this case. Promoting form over substance would create a special and purely facial test for the FAA. It would upend the established understanding of how worker status is determined, create inconsistency and uncertainty for companies and their workers, and, if allowed to bleed into the determination of substantive rights, open the door to the erosion of decades of precedent prohibiting the waiver of employees' rights. In short, calling a worker an "independent contractor" in a contract does not make it so under any of the employment laws canvassed above, and this Court should not make the FAA the sole exception.

CONCLUSION

Where statutory background gives no cause to distinguish between employees and independent contractors, courts do not read in such a distinction. Amici respectfully request that this Court affirm the First Circuit's opinion. But should this Court find that worker status matters under the FAA exemption, the distinction must be drawn in the way courts have universally done across the employment-law spectrum: based on the actual working relationships, not on bare contractual labels.

Respectfully submitted,

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No. 17-340

IN THE

Supreme Court of the United States

NEW PRIME, INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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INTEREST OF *AMICI CURIAE*[1]

The *amici* are scholars of American labor and legal history, and thus have a professional interest in accurate and valid inferences from the historical record. They are: Shane Hamilton, University of York; Jon Huibregtse, Framingham State University; James Gray Pope, Rutgers Law School; Imre Szalai, Loyola University New Orleans College of Law; Paul Taillon, University of Auckland; and Ahmed White, University of Colorado School of Law. Institutional affiliations are for identification purposes only. We submit this brief to help this Court answer the second question presented in this case.

SUMMARY OF ARGUMENT

The Federal Arbitration Act ("FAA") exempts from its reach "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. This Court has concluded that Congress enacted this exemption to avoid unsettling dispute-resolution schemes covering some "workers," including the then-established statutory dispute-resolution schemes covering "seamen" and "railroad employees" under the Shipping Commissioners Act of 1872, and Title III of the Transportation Act of 1920, respectively.

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[1] No counsel for a party authored this brief in whole or in part. No person other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have provided written consent to the filing of this brief.

Those established schemes did *not* depend on whether a worker would, under the common law of agency, count as an "employee" or an "independent contractor." The Railroad Labor Board repeatedly read its Transportation Act jurisdiction over disputes between railroads and their "employees" to include disputes involving workers who would not have counted as a railroad's "employees" at common law. Shipping commissioner arbitration expressly covered "any question whatsoever" in a seaman's dispute, including those that did not turn on whether the seaman was anyone's "employee" under the common law of agency.

Thus, by operation of the *ejusdem generis* canon, the FAA exemption's residual clause ("any other class of workers") does not cover only common-law employees. If Congress had intended the FAA exemption to cover only common-law employees, as New Prime now reads it, Congress would have disrupted the very statutory dispute-resolution schemes for "seamen" and "railroad employees" that it had wanted to avoid unsettling.

ARGUMENT

I. The Transportation Act Covered Railroad Workers Who Would Not Have Counted as Employees Under the Common Law of Agency

This Court has declared "that Congress excluded 'seamen' and 'railroad employees' from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers." *Circuit*

City Stores v. Adams, 532 U.S. 105, 121 (2001). Thus, when Congress enacted the FAA in 1925, it intended the FAA exemption to ensure that the FAA did not disrupt the settled scope of the "grievance procedures" that then existed for railroad workers under federal law, namely Title III of the Transportation Act, 1920, ch. 91, §§ 300–316, 41 Stat. 456, 469-74. *Circuit City*, 532 U.S. at 121.

Under that Act, the Railroad Labor Board repeatedly read its authority to decide disputes between railroads and their "employees" to include workers who, under the common law of agency, might have been classified as "independent contractors" or otherwise not counted as the railroad's "employees." Accordingly, by operation of the *ejusdem generis* canon, the FAA exemption's residual clause cannot be limited in scope only to common-law employees. If not, the FAA would have disrupted the Transportation Act's dispute-resolution scheme.

A. Railroad "Employees" Under the Transportation Act Included Workers Who Were Not Common-Law Employees of the Railroad

Enacted in 1920, the Transportation Act's Title III imposed "the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof." § 301, 41 Stat. at 469. If railroads and workers could not resolve their disputes themselves by conference or by

a board of adjustment, the Act authorized a nine-member Railroad Labor Board to hear and decide those disputes. *See* §§ 304-307, 41 Stat. at 469-70.

Under this scheme, the Act's coverage and the Railroad Labor Board's jurisdiction often depended on whether the workers in a labor dispute counted as the railroad's "employees" under the Act. The duty under section 301 of the Act covered only disputes "between the carrier and the employees or subordinate officials thereof." § 301, 41 Stat. at 469. Similarly, the Railroad Labor Board had jurisdiction over disputes involving "grievances, rules, or working conditions . . . between the carrier and its employees or subordinate officials," § 303, 41 Stat. at 470, *see* § 307(a), 41 Stat. at 471, or "disputes with respect to the wages or salaries of employees or subordinate officials of carriers," § 307(b), 41 Stat. at 471.

In turn, the Railroad Labor Board read its jurisdiction over disputes between railroads and their "employees" to include disputes involving workers who would not have counted as the railroad's employees under the common law of agency. In *Railway Employees' Dep't, A.F. of L v. Indiana Harbor Belt Railroad Co.*, No. 982, 3 R.L.B. 332 (1922) ("Decision No. 982"), the railroad had argued that because the shop employees were nominally employed by a third-party contractor, not the railroad, the Transportation Act did not apply. *See id.* at 336. The Board disagreed:

> When Congress in this act speaks of railroad employees it undoubtedly contemplates those engaged in the customary work directly contributory to

> the operation of the railroads. It is absurd to say that carriers and their employees would not be permitted to interrupt commerce by labor controversies unless the operation of the roads was turned over to contractors, in which event the so-called contractors and the railway workers might engage in industrial warfare ad libitum. . . . A strike by the employees of a contractor or contractor-agent of a carrier would as effectually result in an interruption to traffic as if the men were the direct employees of the carrier.

Id. at 337-38.

In subsequent similar cases, the Board applied or extended Decision No. 982 to declare that the workers in those cases, though nominally working for a third-party contractor, counted as the railroad's "employees" under the Act. See *United Bhd. of Maint. of Way Employees & Ry. Shop Laborers v. Chicago Great W. R.R. Co.*, No. 1075, 3 R.L.B. 539, 539-40 (1922); *Ry. Employees' Dep't, A.F. of L. v. Chicago Great W. R.R. Co.*, No. 1076, 3 R.L.B. 540, 542 (1922); *Ry. Employees' Dep't, A. F. of L. v. St. Louis, Brownsville & Mexico Ry. Co.*, No. 1078, 3 R.L.B. 544, 545 (1922); *United Bhd. of Maint. of Way Employees and Ry. Shop Laborers v. Indiana Harbor Belt R.R. Co.*, No. 1079, 3 R.L.B. 545, 547 (1922); *Ry. Employees' Dep't, A. F. of L. v. Missouri, Kansas & Texas Ry. Co.*, No. 1080, 3 R.L.B. 548, 551 (1922); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Cleveland, Cincinnati, Chicago & St.*

Louis Ry. Co., No. 1119, 3 R.L.B. 594, 596 (1922); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. New York Cent. R.R. Co.*, No. 1209, 3 R.L.B. 665, 666 (1922); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Erie R.R. Co.*, No. 1210, 3 R.L.B. 667, 668 (1922); *United Bhd. of Maint. of Way Employees & Ry. Shop Laborers v. San Antonio, Uvalde & Gulf R.R.*, No. 1212, 3 R.L.B. 670, 673 (1922); *Ry. Employees' Dep't, A. F. of L. v. Erie R.R. Co.*, No. 1214, 3 R.L.B. 675, 677 (1922); *Ry. Employees' Dep't, A. F. of L. v. New York Cent. R.R. Co.*, No. 1216, 3 R.L.B. 679, 681-82 (1922); *Am. Fed'n of R.R. Workers v. New York Cent. R.R. Co.*, No. 1217, 3 R.L.B. 682, 683 (1922); *United Bhd. of Maint. of Way Employees & Ry. Shop Laborers v. Erie R.R. Co.*, No. 1218, 3 R.L.B. 683, 685 (1922); *Am. Fed'n of R.R. Workers v. Erie R.R. Co.*, No. 1219, 3 R.L.B. 686, 686-87 (1922); *Am. Fed'n of R.R. Workers v. New York Cent. R.R. Co.*, No. 1220, 3 R.L.B. 687, 688 (1922); *Bhd. of Locomotive Eng'rs v. Cincinnati, Indianapolis & W. R.R. Co.*, No. 1224, 3 R.L.B. 690, 692 (1922); *United Bhd. of Maint. of Way Employees & Ry. Shop Laborers v. St. Louis-San Francisco Ry. Co.*, No. 1231, 3 R.L.B. 702, 704-705 (1922); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. New York Cent. R.R. Co.*, No. 1232, 3 R.L.B. 705, 706-07 (1922); *Ry. Employees' Dep't, A. F. of L. v. Indiana Harbor Belt R.R. Co.*, No. 1235, 3 R.L.B. 709, 710 (1922); *Ry. Employees' Dep't, A. F. of L. v. Erie R.R. Co.*, No. 1241, 3 R.L.B. 727, 727 (1922); *United Bhd. of Maint. of Way Employees & Ry. Shop Laborers v. Chicago & Alton R.R. Co.*, No. 1254, 3 R.L.B. 741, 744 (1922); *Ry. Employees' Dep't, A. F. of L. v. Michigan Cent. R.R. Co.*, No. 1255, 3 R.L.B. 745, 746-47 (1922); *United*

Bhd. of Maint. of Way Employees & Ry. Shop Laborers v. Chicago, Rock Island & Pacific Ry. Co., No. 1256, 3 R.L.B. 747, 750 (1922); *Ry. Employees' Dep't, A. F. of L. v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, No. 1259, 3 R.L.B. 752, 753-54 (1922); *Ry. Employees' Dep't, A. F. of L. v. Pere Marquette Ry. Co.*, No. 1260, 3 R.L.B. 754, 756 (1922); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Cincinnati, Indianapolis & W. R.R. Co.*, No. 1262, 3 R.L.B. 757, 758 (1922); *Ry. Employees' Dep't, A. F. of L. v. Cincinnati, Indianapolis & W. R.R. Co.*, No. 1263, 3 R.L.B. 758, 761-62 (1922); *United Bhd. of Maint. of Way Employees & Ry. Shop Laborers v. Missouri-Kansas-Texas Lines*, No. 2207, 5 R.L.B. 213, 214 (1924); *see also United Bhd. of Maint. of Way Employees & Ry. Shop Laborers v. Chicago, Milwaukee & St. Paul Ry. Co.*, No. 1222, 3 R.L.B. 689, 690 (1922) (relying on previous Board decisions on "the general question of contracting work"); *Ry. Employees' Dep't, A. F. of L., v. Chicago Great W. R.R. Co.*, No. 1225, 3 R.L.B. 692, 695 (1922)("recent decisions" in "the contract question was involved with this carrier"); *United Bhd. of Maint. of Way Employees & Ry. Shop Laborers v. Chicago Great W. R.R. Co.*, No. 1226, 3 R.L.B. 696, 697 (1922) ("board's position on the general question of contracts"); *Ry. Employees' Dep't, A.F. of L. v. Bangor & Aroostook R.R.*, No. 1257, 3 R.L.B. 750, 751-52 (1922) (same). For similar decisions, see *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Chicago Great W. R.R. Co.*, No. 1077, 3 R.L.B. 542 (1922); and *United Bhd. of Maint. of Way Employees & Ry. Shop Laborers v. Chicago & N. W. Ry. Co.*, No. 1215, 3 R.L.B. 678 (1922).

Indeed, the Board even extended Decision No. 982 to cases in which the railroad had contracted out its workers to third-party contractors, and then those workers had left the contractor to go on strike. *See Ry. Employees' Dep't, A. F. of L., v. W. Maryland Ry. Co.*, No. 1361, 3 R.L.B. 934, 938-939 (1922); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Delaware, Lackawanna & W. R.R. Co.*, No. 3905, 6 R.L.B. 1248, 1249-50 (1925).

More importantly, the Board applied Decision No. 982 to a case where the railroad contracted *directly* with individual workers who, it later argued, were non-employee contractors, and thus outside the Board's jurisdiction. *United Bhd. of Maint. of Way Employees & Ry. Shop Laborers v. St. Louis-San Francisco Ry. Co.*, No. 1230, 3 R.L.B. 700 (1922). There, the railroad took bids from individuals for contracts to work as "pumpers," *i.e.*, to operate the railroad's water-pumping stations. *See id.* at 700. After bidding, the railroad awarded some contracts to some of its nominal employees then already working as pumpers, and other contracts to "outsiders" who thereby "displaced" other nominal railroad employees. *Id.* Later, the railroad defended this practice, noting that it had handled these contracts "'on the same basis as all other contract work. . . . Any employee of the company had the privilege under public notice to enter his bid covering the operation of pumping plant on the same basis as a nonemployee.'" *Id.* at 702.

The Railroad Labor Board disagreed: Decision No. 982's "principle with respect to contracting as well as the apparent nonconformity with the purpose and intent of the transportation act and decisions of the

Labor Board is much more pronounced in the so-called individual contracts than in the contracts with firms and corporations." *Id.* Thus, "the so-called 'individual contracts' between the individual employees" and the railroad violated the Transportation Act insofar as the railroad took those contracts to "remove said employees from the application of" the Act. *Id.* Those workers, though nominally independent contractors, still counted as the railroad's "employees" under the Transportation Act.

These Board decisions cannot have escaped Congress's notice, because the railroads' contracting-out practices was one of the main reasons for the national railroad shopmen's strike of 1922. *See* Colin J. Davis, *Power at Odds: The 1922 National Railroad Shopmen's Strike* 57-59 (1997); Margaret Gadsby, *Strike of the Railroad Shopmen*, 15 Monthly Lab. Rev. 1, 16 (Dec. 1922). In that strike (July – October 1922), over 250,000 shopmen walked off the job. *See* Davis, *supra* at 67-68. Violent clashes followed, *see id.* at 83-100, as did railroad service interruptions that led to serious shortages in grain, coal, and steel, among other costs to the national economy, *see id.* at 163.

A few months after the strike ended, the FAA's reference to "railroad employees" appeared as part of proposed changes to FAA bills introduced into the 67th Congress in December 1922, *see* 64 Cong. Rec. 797 (1922) (H.R. 13522); 64 Cong. Rec. 732 (1922) (S. 4214). By letter, dated January 31, 1923, Commerce Secretary Herbert Hoover, who months earlier had met with railroad executives and their financiers to resolve the shopmen's strike, *see* Davis, *supra* at 107—09, wrote to the Senate Judiciary subcommittee then

holding hearings on the Senate bill (S. 4214) to express support and suggest an amendment: "If objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.'" *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong., 4th Sess. 14 (1923) (hereinafter "Hearing on S. 4213") (reprinting letter).[2]

Although these FAA bills died in committee, new versions of them, now with Hoover's proposed "workers' contracts" exemption, were filed in the 68th Congress, and Hoover endorsed those bills. *See*

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[2] In that hearing, South Dakota Senator Sterling referred to a letter "from a constituent of mine, Mr. C.O. Bailey, a lawyer at Sioux Falls." *Hearing on S. 4213*, *supra* at 9. Bailey was a prominent South Dakota lawyer and his firm, Bailey & Voorhees, had some large railroads as clients. *See* Imre Szalai, *Outsourcing Justice: The Rise of Modern Arbitration Laws in America* 133 (2013). Before the hearing, Senator Sterling had sent Bailey's letter to Charles Bernheimer, President of the New York State Chamber of Commerce's Arbitration Committee and the principal booster of the FAA. *Id.* In turn, Bernheimer asked Chamber counsel Julius Cohen to respond to Bailey's concerns, which included how the proposed FAA would apply to workers engaged in interstate commerce. *Id.* at 133-34. Following Bailey's suggestion, Cohen proposed an FAA exemption identical to Hoover's proposed "workers' contracts" exemption, which Bernheimer then forwarded to Senator Sterling. *Id.* at 135. Bernheimer later suggested that he had solicited or encouraged Hoover's letter to the Senate subcommittee. *See id.* at 145.

Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomm. of the Comm. on the Judiciary, 68th Cong., 1st Sess. 20 (1924).

New Prime argues that, under the *ejusdem generis* canon, the scope of the FAA exemption's residual clause ("any other class of workers") should be similar to the scope of the FAA's "railroad employees" exemption. *See* Pet. Br. at 26-27. Congress, however, cannot have intended the "railroad employees" exemption to be limited to common-law employees, because the Railroad Labor Board repeatedly refused to limit the Transportation Act to common-law employees of railroads. Therefore, by *ejusdem generis* alone, the FAA exemption's residual clause should not be limited to common-law employees.

B. The FAA Would Have Disrupted the Transportation Act Had It Only Exempted Common-Law Employees

Had the FAA's "railroad employees" exemption covered *only* railroad workers who counted as employees under the common law of agency, as New Prime argues, *see* Pet. Br. at 25-26, the FAA would have disrupted the Transportation Act's dispute-resolution scheme.

To illustrate, suppose the workers' contracts to work as pumpers in *United Bhd. of Maint. of Way Employees & Ry. Shop Laborers v. St. Louis-San Francisco Ry. Co.*, No. 1230, 3 R.L.B. 700 (1922), included pre-dispute arbitration clauses. If so, under New Prime's reading, the railroad could have used the

FAA, 9 U.S.C. § 4, to have a court compel arbitration of those workers' disputes *outside* the Transportation Act's statutory dispute-resolution scheme, because the common law of agency would treat those workers as "independent contractors." At the same time, the Railroad Labor Board could still decide those disputes, because those workers were the railroad's "employees" under the Transportation Act, and because the Board did not need both parties' assent to assert its jurisdiction, *see* § 307(a)(1)-(3), (b)(1)-(3), 41 Stat. at 470-71.

Thus, the same dispute could lead to both an arbitral award and a Railroad Labor Board decision. The problem: the FAA made the arbitral award judicially enforceable, 9 U.S.C. § 9, while a Railroad Labor Board decision was *not* judicially enforceable under the Transportation Act, *see Pennsylvania R. Co. v. U.S. R.R. Labor Bd.*, 261 U.S. 72, 79 (1923), nor subject to judicial review on the "correctness" of the Board's conclusions, *id.* at 85.

Accordingly, if the arbitrator and the Railroad Labor Board disagreed, the FAA, by making the arbitrator's award judicially-enforceable, would in effect let the arbitral award supplant the (judicially-unenforceable) Board's decision. This would have unsettled Title III of the Transportation Act, because Congress predicated that scheme on using the force of public opinion *alone* to motivate compliance with Board decisions. *See id.* at 79-80 (Board decision's "only sanction" is "the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the Board, and the full publication of the violation of

such decision by any party to the proceeding. . . . The function of the Labor Board is to direct . . . public criticism against the party who, it thinks, justly deserves it."); *id.* at 84 ("It was to reach a fair compromise between the parties without regard to the legal rights upon which each side might insist in a court of law. . . . Under the act there is no constraint upon them to do what the Board decides they should do except the moral constraint . . . of publication of its decision.").

C. Neither the Federal Employers' Liability Act nor the Railway Labor Act Matter Here

Although New Prime relies on the Federal Employers' Liability Act of 1908, *see* Act of April 22, 1908, ch. 149, 35 Stat. 65 ("FELA"), and the Railway Labor Act of 1926, ch. 347, 44 Stat. 577, *see* Pet. Br. at 25-26, neither supports reading the FAA's exemption to cover only common-law employees.

First, Congress did not refer to "railroad employees" in the FAA to avoid unsettling a statutory dispute-resolution scheme for potential FELA plaintiffs (injured railroad workers), because there was *no* such scheme. Rather, Congress expected FELA plaintiffs to proceed to court like anyone else with a similar federal statutory cause of action. Besides, in Decision No. 982, the Railroad Labor Board had rejected FELA cases as not "in point" in deciding the scope of the Board's jurisdiction under Title III of the Transportation Act, because those statutes had different purposes. *Ry. Employees' Dep't, AFL*, 3 R.L.B. at 338.

Second, the Railway Labor Act of 1926 does not matter. The 69th Congress enacted it in May 1926, well *after* the 68th Congress had enacted the FAA in February 1925. In invoking the Railway Labor Act nonetheless, New Prime and its *amici* seem to assume that, over a year *before* the 69th Congress moved from one statutory dispute-resolution scheme for railroad workers (Title III of the Transportation Act) to the other (the Railway Labor Act), the 68th Congress had treated that change as inevitable and had wanted the scope of the FAA exemption's residual clause to *vary accordingly*.

That is not how *ejusdem generis* works where, as here, Congress enacted the FAA exemption's residual clause and its more specific terms ("seamen" and "railroad employees") at the same time in the same Act. *See, e.g., Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624-25 (2018) (applying *ejusdem generis* to read National Labor Relations Act § 7's catchall clause not to cover class or collective actions immediately after describing "procedures like" class or collective actions as "hardly known when" Congress enacted that Act in 1935).

Moreover, when the 68th Congress enacted the FAA in February 1925, the Railway Labor Act's passage was not inevitable. The Howell-Barkley bill, introduced a year earlier, had already failed to pass, largely because of strong opposition from railroad executives, the Coolidge administration, and House Republicans. *See* Jon R. Huibregtse, *American Railroad Labor and the Genesis of the New Deal, 1919-1935*, at 54-56 (2010); Robert H. Zieger, *Republicans and Labor, 1919-1929*, at 198-202 (1969). Carrier-

union negotiations to replace the Transportation Act were stalled and would remain so until shortly after March 1925, when this Court confirmed again that Railroad Labor Board decisions were not judicially enforceable, *see Pennsylvania R.R. Sys. & Allied Lines Fed'n No. 90 v. Pennsylvania R.R. Co.*, 267 U.S. 203, 215-16 (1925), and there arose the prospect of a strike by unions who were resisting a judge's order to comply with Board subpoenas, *see Railroad Labor Bd. v. Robertson*, 3 F.2d 488 (N.D. Ill. 1925), *rev'd* 268 U.S. 619 (1925). *See* Huibregtse, *supra*, at 70-72. When finally introduced, almost a year later, the bill that became the Railway Labor Act, *see* H.R. 9463, 69th Cong. (Feb. 1926), though ultimately successful, faced serious opposition in Congress, *see* Zieger, *supra*, at 207-10. Thus, although this Court described the Railway Labor Act's passage as then "imminent", *Circuit City*, 532 U.S. at 121, the 68th Congress never had such hindsight.

Perhaps New Prime and its *amici* are really arguing that the 69th Congress had wanted some part of the Railway Labor Act *itself* (such as how it defined "employee"[3]) to fundamentally narrow the 68th Congress's intended scope of the FAA exemption. That inference is "more than a little doubtful," because of the "usual rule that Congress does not alter the fundamental details of a regulatory scheme in vague

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[3] § 1(Fifth), 44 Stat. at 577; and *In re Regulations Concerning the Class of Employees and Subordinate Officials That Are to be Included with the Term "Employee" under the Railway Act*, 136 I.C.C. 321 (1928) (employees of railroads who belong to and exclusively operate unincorporated voluntary association of railroad carriers are also "employees" of that association).

terms or ancillary provisions." *Epic Sys. Corp.*, 138 S. Ct. at 1626-27 (citation and internal quotation marks omitted). The Railway Labor Act of 1926 does not mention the FAA at all, *see* ch. 347, 44 Stat. 577, and neither does its legislative history, *see* S. Comm. on Labor and Public Welfare, 93d Cong., *Legislative History of the Railway Labor Act, As Amended (1926 Through 1966)* 18-720 (1974).

II. Shipping Commissioner Arbitration Covered Seamen's Disputes That Did Not Turn on Whether Those Seamen Were Common-Law Employees

Congress excluded "contracts of employment of seamen" from the FAA to avoid unsettling the then-established statutory dispute-resolution scheme for seamen's disputes under the Shipping Commissioners Act of 1872, ch. 322, §§ 25-26, 17 Stat. 262, 267, codified as amended, 46 U.S.C. §§ 651-652 (1925).[4] See *Circuit City*, 532 U.S. at 121 (citing this scheme). That scheme covered "any question whatsoever between a master, consignee, agent or owner, and any of his crew." 46 U.S.C. § 651 (1925). Such disputes mostly did *not* turn on whether the "crew" member (the seaman) was an "employee" under the common law of agency. If the FAA's "seamen" exemption had covered only common-law employees, the FAA would have

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[4] In 1979, Congress ended the use of shipping commissioners: "[N]one of these funds appropriated in this or any other Act shall be available for pay or administrative expenses in connection with shipping commissioners in the United States." Department of Transportation and Related Agencies Appropriation Act, 1980, Pub. L. No. 96-131, 93 Stat. 1023, 1024 (1979).

disrupted that scheme. Accordingly, the FAA exemption should not be read to cover only common-law employees.

A. Shipping Commissioner Arbitration Covered Any Question in a Seaman's Dispute

In the Shipping Commissioners Act of 1872, to further protect "seamen in respect to their treatment and wages," *Inter-Island Steam Nav. Co. v. Byrne*, 239 U.S. 459, 462 (1915), Congress authorized the appointment of "shipping commissioners" for each port of entry to oversee and enforce certain statutory requirements concerning the engagement, discharge, and wages of seamen. *See* §§ 12-24, 17 Stat. at 264-67. Shipping commissioner duties included enforcing the requirement, in place since 1790, that a vessel master make written agreements ("shipping articles") with every seaman on board that vessel that followed a prescribed form and set forth certain terms, *see* Act of July 20, 1790, ch. 29, 1 Stat. 131, codified as amended, 46 U.S.C. § 564 (1925), unless the master was otherwise exempted from doing so, *see, e.g.*, *id.* § 566 (exempting "masters of coastwise [and] lake-going vessels that touch at foreign ports").

More importantly, the Shipping Commissioners Act also authorized shipping commissioners to "hear and decide any question whatsoever between a master, consignee, agent or owner, and any of his crew, which both parties agree in writing to submit to him." § 25, 17 Stat. at 267. In this scheme, the shipping commissioner's award bound "both parties, and shall, in any legal proceedings which may be

taken in the matter, before any court of justice, be deemed to be conclusive as to the rights of parties." *Id.* And in any such "proceeding relating to the wages, claims, or discharge of a seaman," the shipping commissioner could "call upon the owner, or his agent, or upon the master, or any mate, or any other member of the crew" to produce themselves or any documents they had for examination. § 26, 17 Stat. at 267.[5]

These sections of the Act were later touted as "among the most useful of those relating to seamen, and they doubtless prevent considerable litigation and waste of time and money by all concerned." Bureau of Navigation, *Annual Report of the Commissioner of Navigation to the Secretary of Commerce and Labor* 69 (1909); *see also Commissioner's Power Invaded*, Seaman's Journal, June 23, 1920, at 8 (excerpt of letter from agent of Eastern and Gulf Sailors' Association) ("seamen have been generally satisfied to assent to the Shipping Commissioner's rulings, because the great majority of minor disputes involving questions of overtime and fines, when not settled at the pay table on board the ship, never advanced further than the Commissioner's office, where a Union representative could always be present to intervene in behalf of the dissatisfied seaman").

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[5] Congress later provided that the Shipping Commissioners Act of 1872 did not apply to, *inter alia*, certain "sail or steam vessels engaged in coastwide trade" as well as "any case where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise, or voyage." Act of June 9, 1874, ch. 260, 18 Stat. 64, 64-65.

Thereafter, while Congress added to seamen's legal protections, *see, e.g.*, Act of March 4, 1915, ch. 153, 38 Stat. 1164; Merchant Marine Act, 1920, ch. 250, § 33, 41 Stat. 988, 1007 ("Jones Act"), and changed how shipping commissioners were appointed, supervised, and paid, *see generally* Lloyd M. Short, *The Bureau of Navigation: Its History, Activities and Organization* 85-88 (1923), the scope of shipping-commissioner arbitration remained unchanged: "any question whatsoever," so long as the disputed question was "between a master, consignee, agent or owner, and any of his crew," and "both parties" agreed "in writing" to submit that issue to the shipping commissioner, 46 U.S.C. § 651 (1925).

In denoting the parties to such arbitration, *see id.* ("master, consignee, agent or owner, and any of his crew"); *id.* § 652 ("seaman"), Congress used maritime terms of art with well-settled meanings, such as "seaman", *see id.* § 713 ("In the construction of this chapter, . . . every person (apprentices excluded) who shall be employed or engaged to serve *in any capacity* on board the [vessel] shall be deemed and taken to be a 'seaman'.") (emphasis added); *see also McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 346 (1991) ("settled" maritime law by 1920 that "seaman" need only be a person "employed on board a vessel in furtherance of its purpose").

Similarly, it was well settled that a vessel's "crew" typically covered its seamen and inferior officers, unless the statute excluded those officers "by enumerating them, as contradistinguished from the rest of the crew." *United States v. Winn*, 28 F. Cas. 733, 735 (C.C.D. Mass. 1838) (Story, J.); *accord The*

Marie, 49 F. 286, 287 (D. Or. 1892); *see also The Buena Ventura*, 243 F. 797, 798-99 (S.D.N.Y. 1916) ("wireless operator" was part of vessel's "crew" despite coming on board "in pursuance of a contract between [vessel] owners and the Marconi Wireless Telegraph Company of America"); *The Manchioneal*, 243 F. 801, 805 & n.1 (2d Cir. 1917) (same); *The Bound Brook*, 146 F. 160, 164 (D. Mass. 1906) (a vessel's "crew" "naturally and primarily" refers to persons "on board her aiding in her navigation, without reference to the nature of the arrangement under which they are on board").

Indeed, if a vessel's master had to follow the shipping-article requirements for a seaman, that seaman was necessarily part of the "crew", because a master was only so obliged for "every seaman whom he carries to sea *as one of the crew*." 46 U.S.C. § 564 (1925) (emphasis added); *see also id.* § 563 (authorizing shipping commissioners to "ship crews" for vessels engaged in certain kinds of trade, provided "an agreement shall be made with each seaman engaged *as one of such crew*" that satisfies certain requirements) (emphasis added).

B. The FAA Would Have Disrupted Shipping Commissioner Arbitration Had It Only Exempted Seamen Who Were Common-Law Employees

New Prime errs by reading "contracts of employment of seamen" in the FAA to cover only "seamen" who are *also* "employees" under the common law of agency. *See* Pet. Br. at 26 (citing the Jones Act). This reading would have disrupted how Congress had calibrated shipping-commissioner arbitration. Unlike

the FAA, a shipping commissioner's arbitral authority triggered only if "both parties agree in writing to submit [the disputed question] to him," 46 U.S.C. § 651 (1925), *i.e.*, *after* the dispute arose, *see The W.F. Babcock*, 85 F. 978, 982-93 (2d Cir. 1898); *The Howick Hall*, 10 F.2d 162, 163 (E.D. La. 1925); *The Donna Lane*, 299 F. 977, 982 (W.D. Wash. 1924).

This is partly why, in January 1923, International Seamen's Union of America President Andrew Furuseth objected to the FAA (then proposed without any workers exemption). His worry: Shipowners would add *pre*-dispute arbitration clauses when engaging a seaman and then, when a dispute arose, they would use the FAA to *compel* that seaman to submit that dispute to shipping-commissioner arbitration, even though that seaman, if choosing *post*-dispute, would have rather gone to court:

> With reference to the seaman it will be an easy matter. Place in the contract to labor—the shipping articles—any rider not specifically prohibited by law, and the articles are loaded down with such already, and then at the end of the articles a rider already rather usual, that any disagreement shall be arbitrated by the Shipping Commissioner (under existing statutes this includes consuls), and the seaman's right to wages, to food, to damages under the Jones Act, together with his present right to quit work in harbor, becomes void. With the seaman the machinery is there and ready. The shipowner only needs this bill

> to become law and slavery is restored without any other noise, except such as the victim may make.

Analysis of H.R. 13522 Submitted by President Andrew Furuseth to the Convention Which Was Adopted, in *Proceedings of the Twenty-Sixth Annual Convention of the International Seamen's Union of America* 204 (1923).[6]

New Prime's reading would have disrupted shipping commissioner arbitration in this way for *most* of the disputes it covered. Jones Act aside, those disputes mostly did *not* turn on whether that seaman was an "employee" under the common law of agency. *See, e.g.*, 46 U.S.C. § 594 (1925) (seaman who "signed an agreement and is afterwards discharged before the commencement of the voyage . . . without fault on his part justifying the discharge" is entitled to one month's wages "as if it were wages duly earned"); *id.* § 578 (seaman "shipped" contrary to "any act of Congress" may "leave the service at any time, and shall be entitled to recover the highest rate of wages of the port from which the seaman was shipped, or the sum agreed to be given him at his shipment"); *Whitney*

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[6] FAA drafters referred to Furuseth's opposition when suggesting what became the FAA's workers exemption. *See Report of the Committee on Commerce, Trade and Commercial Law*, 46 Ann. Rep. A.B.A. 284, 287 (1923); *Hearing on S. 4213*, *supra* at 9. Although this Court gave no weight to Furuseth's general opposition to *any* employment arbitration, *see Circuit City*, 532 U.S. at 119-20, his comment here simply illustrates *how* the FAA could have affected shipping-commissioner arbitration, and thus why Congress had reason to exempt seamen from the FAA, *see id.* at 121.

v. Tibbol, 93 F. 686, 687-88 (9th Cir. 1899) (seamen had enforceable wage lien on freight owed to shipowner). Indeed, by 1925, of all the provisions set forth in chapter 18, title 46, of the U.S. Code (titled "Merchant Seamen"), *see* 46 U.S.C. §§ 541-713 (1925), just *one*—the Jones Act—used the term "employee," *see id.* § 688.

Thus, if the FAA had exempted only seamen who were also common-law employees, as New Prime argues, the FAA would have largely undermined Congress's decision to predicate shipping commissioner arbitration on the *post-dispute* assent of both parties. And absent such assent, that scheme's coverage would have turned on a question—whether the seaman was an "employee" under the common law of agency—that otherwise did not matter for most seaman disputes under federal law.

Indeed, even for seaman disputes arising under *State* law, New Prime's reading of the FAA would have similarly disrupted shipping commissioner arbitration. To illustrate, consider disputes over fees for maritime pilots. Maritime pilots are "trained and skilful [sic] seamen" hired to navigate vessels into and out of ports, or along rivers, harbors, and similar waterways, *The China*, 74 U.S. 53, 67 (1868), and thus were treated as part of a vessel's crew, *see, e.g.*, 46 U.S.C. § 221 (1925) (requiring "all the officers of vessels of the United States who shall have charge of a watch, including pilots" to be U.S. citizens). By the time of the FAA, Congress had long let States regulate the employment and licensing of some maritime pilots. *See* 46 U.S.C. §§ 211-215 (1925); *see also Cooley*

v. Board of Wardens, 53 U.S. 299, 317 (1852) (discussing antecedent 1789 federal statute).

In turn, some States required vessel masters or owners to hire a duly licensed pilot to navigate certain waterways within the State's boundaries, *see, e.g.*, *China*, 74 U.S. at 60-61 (discussing 1857 New York law), and set the fees for such piloting services, *see generally* Florence E. Parker, *Development and Operation of Pilots' Associations at Representative Ports*, 19 Monthly Lab. Rev. 16, 22-34 (1924) (surveying pilot fees at various ports).

This matters here, because under such State laws, a vessel's master, owner, and consignee were usually liable for those pilot fees.[7] Indeed, pilots could

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[7] *See, e.g.*, Ala. Code § 2506 (1923) ("The master, owner or consignee of any ship or vessel must pay the pilot who conducts a vessel into or out of the bay or harbor of Mobile . . . ."); Calif. Political Code § 2488 (Deering 1924) (master, owner, or consignee of vessel liable for both pilot's "regular fees" and additional amount for pilot's "extra service for the preservation of such vessel while in distress"); Ga. Code Ann. § 1905 (Park 1914) ("all fees for pilotage may be demanded and recovered . . . from the owner, master, or consignee of the vessel"); N.J. Comp. Stat. vol. 3, § 32, at 3955-56 (1911) (pilotage "payable by the master, owner, agent, or consignee entering or clearing the vessel . . . who shall be jointly and severally liable therefor"); Or. Laws § 7730 (1920) ("master, owner, and consignee or agent are jointly and severally liable to" pilot for "any sum due him for piloting or offering to pilot" vessel); Digest of Pa. Stat. Law 1920 § 21704 (West 1921) (where inbound ship or vessel prevented from proceeding to port of Philadelphia, "pilot shall be entitled to receive and recover from the owner or consignee of such ship or vessel full pilotage" plus additional amount); S.C. Code of Laws

(*Footnote continued*)

bring admiralty actions in federal court to recover fees owed under such State laws. *See Reardon v. Ankell*, 59 F. 624 (S.D.N.Y. 1894). Liability under such State laws did not turn on whether the pilot had been anyone's "employee" under that State's common-law of agency. Under New Prime's view, however, although Congress exempted "seamen" from the FAA, it still wanted to let shipowners disrupt shipping commissioner arbitration by using the FAA to compel pilots to arbitrate their fee disputes arising under such State laws, depending on whether those pilots would have been "employees" or not under that State's common law of agency. That seems unlikely.

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tit. 11, ch. 28, § 21 (1922) ("Any pilot boarding a vessel on pilot ground shall be entitled to receive from the master, owner, or consignee, four dollars for every day of his being on board previous to her coming into port, in addition to the fees of pilotage"); Tex. Rev. Civil. Stat. art. 8255, 8256 (1925) (pilotage liability of vessel and consignee); Va. Code § 3635 (1924) (master and owner of "every vessel" liable to pilot for "his pilotage and other allowances, and also the consignee or supercargo of any vessel not owned by a citizen of the State"); Wash. Comp. Stat. Ann. § 9872 (Remington 1922) (pilotage on Puget Sound); *id.* §§ 9877, 9887 (pilotage on Columbia River).

CONCLUSION

This Court should decide the second question presented in the respondent's favor.

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July 25, 2018

No. 17-340

In The
Supreme Court of the United States

NEW PRIME, INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF AMICI CURIAE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, NATIONAL EMPLOYMENT LAW PROJECT, INC., ECONOMIC POLICY INSTITUTE, AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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IDENTITY AND INTEREST OF AMICI

Amici are worker membership and advocacy groups that confront and combat independent contractor misclassification in lower-wage jobs. Amici are concerned that a ruling in favor of Petitioner New Prime, Inc. ("Prime") would create incentives for more companies to misclassify their employees as independent contractors in order to evade worker protections.[1]

Founded in 1903, the International Brotherhood of Teamsters represents more than 1.4 million hardworking men and women across the United States, Canada and Puerto Rico. A significant segment of Teamster membership work as drivers in the transportation industry. Teamster work involves transporting containers of goods from the nation's ports, through the supply chain to retail stores and consumers' homes. Teamsters are conducting a long-standing campaign to organize port truck drivers, the vast majority of whom are misclassified as independent contractors. The Teamsters' interest in this case is to ensure that all drivers involved in interstate commerce, including those classified as independent contractors, are afforded the exemption granted to contracts of employment in the transportation industry found in Section 1 of the Federal Arbitration Act ("the Act"). The Teamsters are also concerned that Prime's errant suggestion that

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[1] Amici state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, as provided in Rule 37.6. This brief is submitted with the consent of both parties under Rule 37.3(a).

employment relationships under the Act should be identified by the terms of the contract alone may affect misclassification analysis under other statutes.

The National Employment Law Project (NELP) is a non-profit organization with over 45 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP has studied and written about the working conditions and employment relationships of truck drivers, publishing two comprehensive reports on the subject, THE BIG RIG: POVERTY, POLLUTION, AND THE MISCLASSIFICATION OF TRUCK DRIVERS AT AMERICA'S PORTS, in 2010, and THE BIG RIG OVERHAUL: RESTORING MIDDLE-CLASS JOBS AT AMERICA'S PORTS THROUGH LABOR LAW ENFORCEMENT, in 2014. NELP has litigated and participated as *amicus curiae* in numerous cases addressing independent contractor misclassification under federal and state labor and employment laws. NELP seeks to ensure that all employees receive the full protection of labor and employment laws and that employers are not rewarded for, and are deterred from, skirting those basic rights.

The Economic Policy Institute (EPI) is a non-profit organization with over 30 years of experience analyzing the effects of economic policy on the lives of American's working families. EPI has studied and written on the misclassification of workers and wage theft. This research includes publishing the report (IN)DEPENDENT CONTRACTOR MISCLASSIFICATION (2015), which examines the misclassification of workers across the economy including the pervasiveness of the practice in

the trucking industry. EPI has also participated as *amicus curiae* in numerous cases addressing independent contractor misclassification under federal and state labor and employment laws. EPI strives to protect and improve the economic conditions of working people. EPI is concerned that all employees enjoy the full protections of labor and employment laws and that employers are not permitted to misclassify workers.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been treated unlawfully in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

INTRODUCTION AND SUMMARY OF ARGUMENT

Truck drivers, like the Respondent Dominic Oliveira, are frequently misclassified by their employers as independent contractors. This treatment excludes drivers from basic labor and employment protections like the minimum wage, health and safety, and discrimination protections, to name a few. This Court does not need to determine whether in fact Mr. Oliveira was misclassified by Prime, because he and the company entered into a contract of employment that should be exempt under the plain language of the Federal Arbitration Act. But if the Court decides that the employee versus independent contractor relationship must be decided in order to determine the applicability of the FAA, it should take into account the independent contractor misclassification problems endemic in the trucking industry, the impacts on workers, other employers, and state budget and tax coffers, and on employers' economic incentives to misclassify more drivers that will result.

Independent contractor misclassification, and the worker abuses it engenders, are pervasive in the trucking industry and exemplified by the facts of this case. Prime classifies its drivers as "company drivers," who are treated as employees, or alternatively as "independent contractors," although the work of these drivers is the same. J.A. 118, 136. Prime labeled Mr. Oliveira as an independent contractor, but far from operating his own business, Prime exercised substantial control over Mr. Oliveira's work and prevented him

from working for any other company. J.A. 138, 160. The company controlled his schedule, limited which shipments he could take, and set the rate of payment for those shipments. J.A. 119, 138. Under the independent contractor agreement, Prime made regular deductions from Mr. Oliveira's paycheck for expenses such as "lease payments" on the truck, tools Prime required him to buy, and fuel. J.A. 138. As a result, Prime failed to pay Mr. Oliveira the statutorily required minimum wage and overtime for his work. Indeed, on several occasions, the deductions reduced his pay to zero, and on other occasions even resulted in Mr. Oliveira owing money to Prime. J.A. 120-21.

The plain text of the Federal Arbitration Act requires this Court to find that truckers' independent contractor arrangements like the one in this case are "contracts of employment" and exempt from the FAA's coverage. Amici write to emphasize the policy consequences of a holding to the contrary. Independent contractor misclassification and the unlawful and exploitative working conditions it engenders are rampant across the economy, but particularly prominent in the trucking sector. Employers like Prime, whose drivers in some weeks earn negative earnings, are incentivized to misclassify workers in order to avoid baseline labor standards, payroll tax, and other liability. Misclassification results in substantial losses to public coffers and harm to law-abiding employers, who are forced to compete with companies that chisel wages in a race to the bottom. Perhaps most importantly, misclassification deprives workers of essential workplace

protections and allows employers to perpetrate exploitative worker abuses like those faced by Mr. Oliveira and his colleagues. If the Court finds for Prime, companies like Prime will be further incentivized to classify drivers as independent contractors, whether or not the drivers are truly running their own business, and workers will face substantial obstacles in challenging their misclassification and their job conditions.

Finally, should the Court find that the "contract of employment" analysis requires a determination of whether or not a worker is in fact an independent contractor, such a determination must follow long-standing common law to consider all incidents of the employment relationship, and not just the terms of the contract.

ARGUMENT

I. INDEPENDENT CONTRACTOR MISCLASSIFICATION IS A RAMPANT AND GROWING PROBLEM, PARTICULARLY IN THE TRUCKING INDUSTRY, AND A RULING IN FAVOR OF THE PETITIONER WILL REWARD MISCLASSIFYING EMPLOYERS.

Employers have economic incentives to misclassify workers as independent contractors, and accordingly misclassification is a rampant problem, particularly in the trucking industry. Misclassification is a calculated business decision. Employers who misclassify workers are able to unlawfully lower their operating costs. By

failing to pay the taxes and other payroll costs required for employees, law-breaking employers are able to pocket as much as 30% of payroll costs.[2] This robs unemployment insurance and workers' compensation funds of billions of much-needed dollars, and reduces federal, state, and local tax withholding and revenues. As the United States Government Accountability Office (GAO) concluded in its July 2006 report:

> [E]mployers have *economic incentives* to misclassify employees as independent contractors because employers are not obligated to make certain financial expenditures for independent contractors that they make for employees, such as paying certain taxes (Social Security, Medicare, and unemployment taxes), providing workers' compensation insurance, paying minimum wage and overtime wages, or including independent contractors in employee benefit plans.[3]

The U.S. Department of Labor's Commission on the Future of Worker-Management Relations (the "Dunlop Commission") similarly concluded, "[t]he law should not provide incentives for misclassification of employees as

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[2] NATIONAL EMPLOYMENT LAW PROJECT (NELP), INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES (2017), available at http://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-on-workers-and-federal-and-state-treasuries-update-2017.

[3] GOVERNMENT ACCOUNTABILITY OFFICE, GAO-06-656, EMPLOYMENT ARRANGEMENTS: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 25 (2006) (emphasis added).

independent contractors, which costs federal and state treasuries large sums in uncollected Social Security, unemployment, personal income, and other taxes."[4]

Given these incentives and the challenges of enforcement, independent contractor misclassification is a pernicious problem. According to data from the May 2017 Contingent Worker Supplement to the Current Population Survey, independent contracting is now the primary source of employment for 10.6 million workers in the United States, characterizing 6.9% of primary employment.[5] The U.S. Department of Labor has found that as many as 30% of firms misclassify their employees as independent contractors,[6] and studies commissioned by state governments often cite estimates that are even higher.[7] These studies suggest that millions of workers nationally may be misclassified.[8] Notably

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[4] U.S. DEP'T OF LABOR, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS (1995), available at http://www.dol.gov/_sec/media/reports/dunlop/dunlop.htm#Table.

[5] UNITED STATES BUREAU OF LABOR STATISTICS, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS – MAY 2017 (2018), available at https://www.bls.gov/news.release/pdf/conemp.pdf.

[6] LALITH DE SILVA ET AL., INDEPENDENT CONTRACTORS: PREVALENCE AND IMPLICATIONS FOR UNEMPLOYMENT INSURANCE PROGRAMS i-iv (2000), available at http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf.

[7] NELP, *supra* note 2.

[8] NATIONAL EMPLOYMENT LAW PROJECT (NELP), INDEPENDENT CONTRACTOR VS. EMPLOYEE: WHY INDEPENDENT CONTRACTOR MISCLASSIFICATION MATTERS AND WHAT WE CAN DO TO STOP IT (2016), available at http://www.nelp.org/publication/independent-contractor-vs-employee/.

these studies likely provide conservative estimates of the true scope of misclassification.[9]

Misclassification is particularly rampant in the trucking industry. Approximately 82% of port truck drivers are labeled independent contractors, but an estimated 80% of those drivers are employees under the law and hence misclassified by their employers.[10] New research also suggests that the 80% figure may underestimate the actual prevalence of misclassification in port trucking.[11] A significant shift from employees to contractor classifications in long-haul trucking evidences a similar phenomenon. The number

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[9] Many of the studies are based on unemployment insurance tax audits of employers registered with the state's UI program. The audits seek to identify employers who misclassify workers, workers who are misclassified, and the resulting shortfall to the UI program. Researchers extrapolate from UI audit data to estimate the incidence of misclassification in the workforce and its impact on other social insurance programs and taxes. These UI audits miss a large portion of the misclassified workforce, however, because they rarely identify employers who fail to report any worker payments to state authorities or workers paid completely off-the-books – the "underground economy" – where misclassification is generally understood to be even more prevalent. *See* NELP, *supra* note 2.

[10] REBECCA SMITH, PAUL ALEXANDER MARVY & JON ZEROLNICK, THE BIG RIG OVERHAUL: RESTORING MIDDLE-CLASS JOBS AT AMERICA'S PORTS THROUGH LABOR LAW ENFORCEMENT 29 (2014), available at http://www.justice4ladrivers.net/BigRigOverhaul2014Finalsm.pdf. Port truck drivers pick up containers from or deliver containers to a seaport or intermodal rail terminal and take them a short distance to a warehouse or a rail head within the same state. From there the container is either unpacked and the goods trucked to other states or transported out of state via rail.

[11] *Id.*

of non-employer establishments (i.e., purported "independent contractors") in long-haul general freight trucking grew by 91.1% between 1997 and 2016,[12] while the number of employees increased by only 5.9% over the same period.[13]

Across jurisdictions, and amidst a diverse landscape of tests for distinguishing employees from independent contractors, administrative agencies have routinely found that employers have wrongly classified truck drivers as contractors. In over four hundred decisions by California's Division of Labor Standards and Enforcement,[14] the agency found that employers

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[12] *See* UNITED STATES CENSUS BUREAU, NONEMPLOYER STATISTICS (NES) (1997–2016), available at https://www.census.gov/programs-surveys/nonemployer-statistics/data/datasets.html.

[13] *See* UNITED STATES BUREAU OF LABOR STATISTICS, EMPLOYMENT, HOURS, AND EARNINGS FROM THE CURRENT EMPLOYMENT STATISTICS SURVEY (NATIONAL) (1997–2016), available at https://data.bls.gov/PDQWeb/ce.

[14] Under the agency's economic realities test used for the adjudications, the most significant factor to be considered is whether the employer has control or the right to control the worker, both as to the work done and the manner and means in which it is performed. Additional factors that may be considered are whether the person performing services is engaged in an occupation or business distinct from that of the principal; whether or not the work is a part of the regular business of the principal or alleged employer; whether the principal or the worker supplies the instrumentalities, tools, and the place for the person doing the work; the alleged employee's investment in the equipment or materials required by his or her task or his or her employment of helpers; whether the service rendered requires a special skill; the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; the alleged employee's opportunity for profit or loss depending on his or her managerial skill; the length of time

wrongly classified truck drivers as contractors.[15] Under the same common-law based test, the California Unemployment Insurance Appeals Board has also concluded that truck drivers were identified as contractors when they were legally employees.[16] The results in California mirror agency determinations of port trucker misclassification in New Jersey,[17] and Washington state.[18] State findings of employee status for

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for which the services are to be performed; the degree of permanence of the working relationship; the method of payment, whether by time or by the job; and whether or not the parties believe they are creating an employer-employee relationship. *See S. G. Borello & Sons, Inc. v. Dept. of Industrial Relations*, 48 Cal.3d 341 (Sup. Ct. Cal. 1989).

[15] *See, e.g., Gaitan v. XPO Cartage, Inc.*, Nos. 05-66467 KR, 05-66468 KR, 05-66595 KR, 05-66694 KR (D.L.S.E. Apr. 14, 2017). Hundreds of other decisions are collected here: http://www.nelp.org/wp-content/uploads/CA-DLSE-Cases.pdf.

[16] *See, e.g., Alfaro v. XPO Logistics, Inc.*, No. 5935974 (C.U.I.A.B. Jul. 3, 2017).

[17] *See, e.g., Proud 2 Haul, Inc.*, EIN No. 26073576300000 (D.W.L.D. Feb. 28, 2011). The test under New Jersey law allows for a finding of independent contractor status if the worker is free from the employer's control or direction in performing the work, the work is outside of the usual course of the business and outside of the place of business, and the worker is "customarily engaged in an independently established trade, occupation, profession, or business." N.J. Stat. § 43:21-19(i)(6).

[18] *See Sea Port Logistics* (L&I, Aug. 26, 2011); *RoadLink Services* (L&I, Apr. 10, 2012); *Island Transport Logistics* (L&I, Aug. 24, 2012). The modified ABC test under Washington law allows for a finding of independent contractor status if the worker meets the traditional ABC factors and it can be shown that the worker is responsible for her own costs, has a place of business that is eligible for a business deduction for federal income tax purposes, is responsible for filing with the Internal Revenue Service, has

truck drivers are consistent with agency determinations at the federal level. The Department of Labor's Wage and Hour Division,[19] the Internal Revenue Service,[20] and the National Labor Relations Board[21] have each found in favor of truck drivers who brought claims against their employers for misclassification.

Prime itself has been found to have misclassified its drivers as independent contractors; in a case settled in 2013, female truck drivers called independent contractors by Prime brought sex harassment charges against the company. The district court ruled that "[t]he existence of a contract referring to a party as an independent contractor does not end the inquiry, because an employer may not avoid Title VII by affixing a label to a person that does not capture the substance of the employment relationship." *Huffman v. New Prime, Inc.*, 2003 WL 22424878 (W.D. Mo. 2003) (internal quotations omitted).

In addition to state and federal agency decisions, private and public litigation have resulted in judicial determinations and settlements admitting that employers misclassified their truck drivers as independent contractors. Federal courts have largely resolved in

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accounts with state agencies, and maintains a separate set of books. R.C.W. 51.08.195.

[19] *See C&K Trucking*, No. 1715102 (W.H.D. Feb. 27, 2018); *Container Connection of Southern California*, No. 1634525 (W.H.D. Jan. 22, 2013).

[20] *See Total Transportation Services, Inc.*, No. 76535 (I.R.S. Nov. 4, 2010).

[21] *See, e.g., Hector Sanchez Rosado v. XPO Drayage, Inc.*, No. 5-CA-194058 (N.L.R.B. Jul. 28, 2017).

favor of employee status. In *Doe v. Swift Transp. Co.*, 2017 WL 67521, at *10 (D. Ariz. Jan. 6, 2017), the U.S. District Court of Arizona found that while a transportation company required its truck drivers to sign independent contractor agreements, the company's significant exercise of control over its drivers indicated they were employees nevertheless. In *Hargrove v. Sleepy's, LLC*, 2016 WL 8258865, at *1 (D.N.J. Oct. 26, 2016), the U.S. District Court of New Jersey granted truck drivers' motion for summary judgment that they were employees under New Jersey law. In *Thomas E. Perez v. Shippers Transport Express, Inc.*, Case No. 2:13-CV-04255-BRO-PLA (C.D. Cal. Nov. 17, 2014), the U.S. Department of Labor and a trucking and freight transportation company entered a consent judgment in which the company admitted to its practice of misclassification and agreed to reclassify its drivers as employees. State court decisions have produced parallel findings.[22] Prime itself has been found to have misclassified its drivers alleging sex harassment. *EEOC v. New Prime, Inc.*, 42 F. Supp. 3d 1201 (W.D. Mo. 2014).

Given the numerous financial incentives employers have to misclassify their workers as independent contractors, it is not surprising that misclassification is a widespread problem in general and in the trucking industry in particular. Excluding independent contractors from the FAA's Section 1 exemption for transportation workers will only exacerbate this problem and

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[22] *See, e.g., Romero Garcia et al. v. Seacon Logix, Inc.*, 238 Cal.App.4th 1476, 1488 (Ct. App. 2014).

give employers additional encouragement to misclassify their workers.

II. BAD ACTOR EMPLOYERS MISCLASSIFY WORKERS IN ATTEMPTS TO AVOID TAX AND OTHER LIABILITY, IMPOSING SIGNIFICANT SOCIETAL COSTS ON THE PUBLIC, LAW-ABIDING EMPLOYERS, AND WORKERS.

A. Misclassification harms the public and imposes significant costs to public coffers.

Federal, state, and local governments suffer hefty losses of revenues due to independent contractor misclassification, in the form of unpaid and uncollectible income taxes, payroll taxes, and unemployment insurance and workers' compensation premiums.[23] A 2009 report by the Government Accountability Office (GAO) estimates independent contractor misclassification cost the federal government $2.72 billion in revenue in 2006.[24] According to a 2009 report by the Treasury Inspector General for Tax Administration, misclassification contributed to a $54 billion underreporting of employment tax, and losses of $15 billion in unpaid

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[23] U.S. DEP'T OF LABOR, WAGE AND HOUR DIVISION, MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS, available at https://www.dol.gov/whd/workers/Misclassification/.

[24] GOVERNMENT ACCOUNTABILITY OFFICE, EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION (Aug. 2009), available at http://www.gao.gov/new.items/d09717.pdf.

FICA taxes and UI taxes.[25] In the port trucking industry specifically, experts estimate that nationally almost 50,000 workers are misclassified, costing the federal government $57,427,456 in lost Social Security and Medicare contributions, in addition to $20,859,254 in lost unemployment insurance premiums, and $484,823,334 in lost workers' compensation contributions.[26]

Misclassification results in billions of dollars in lost state income tax revenue as well. Academic studies estimate that the state of Indiana lost $134.8 million in uncollected state income tax revenues in 2008; Michigan lost as much as $32.5 million in state income tax revenue from misclassification in 2009; and Maine lost an estimated $4.3 million in tax revenue in 2004 just from the construction industry.[27] The state of

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[25] TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, WHILE ACTIONS HAVE BEEN TAKEN TO ADDRESS WORKER MISCLASSIFICATION, AGENCY-WIDE EMPLOYMENT TAX PROGRAM AND BETTER DATA ARE NEEDED (Feb. 4, 2009), available at http://www.treas.gov/tigta/auditreports/2009reports/200930035fr.pdf.

[26] SMITH et al., *supra* note 10.

[27] JAMES I. STURGEON & MICHAEL P. KELSAY, UNIV. OF MO.-KANSAS CITY, SUMMARY FINDINGS REGARDING THE ECONOMIC COSTS OF EMPLOYEE MISCLASSIFICATION IN THE STATE OF INDIANA 4 (2010) (estimating that Indiana's unemployment insurance fund lost an average of $36.7 million per year from 2007–2008); DALE L. BELMAN & RICHARD BLOCK, MICH. STATE UNIV., INFORMING THE DEBATE: THE SOCIAL AND ECONOMIC COSTS OF EMPLOYEE MISCLASSIFICATION IN MICHIGAN 11 (2009), available at http://ippsr.msu.edu/publications/ARMisClass.pdf; FRANCOISE CARRE & RANDALL WILSON, HARVARD UNIV. THE SOCIAL AND ECONOMIC COSTS OF EMPLOYEE MISCLASSIFICATION IN THE MAINE CONSTRUCTION INDUSTRY 11 (2005).

California estimates that the annual tax loss due to misclassification is as high as $7 billion.[28]

A growing number of states have been calling attention to independent contractor abuses by creating inter-agency task forces and committees to study the magnitude of the problem, and passing new legislation to combat misclassification. The U.S. Department of Labor has signed Memoranda of Understanding regarding misclassification in thirty-nine states and many of these states have created inter-agency task forces or commissions to work on the problem and issue reports.[29] Along with academic studies and other policy research, the reports document the prevalence of the problem and the attendant losses of millions of dollars to state workers' compensation, unemployment insurance, and income tax revenues. A 2017 review of the findings from the twenty state studies of independent contractor misclassification demonstrates the staggering scope of these abuses.[30]

For example, in California, audits conducted by California's Employment Development Department between 2005 and 2007 recovered a total of $111,956,556 in payroll tax assessments, $18,537,894 in labor code citations, and $40,348,667 in assessments on employment

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[28] STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, WORKER MISCLASSIFICATION, 2018, available at https://www.dir.ca.gov/dlse/worker_misclassification.html.

[29] https://www.dol.gov/whd/state/statecoordination.htm; https://www.dol.gov/whd/workers/misclassification/stateinfo-nojs.htm.

[30] *See* NELP, *supra* note 2.

tax fraud cases.[31] In Tennessee, a 2013 task force report found that 37% of employers misclassified workers, causing a loss to the unemployment insurance system of $8.4 to $15 million, a loss to the workers compensation system of $52 to $91.6 million, a loss of $15.2 to $73.4 million in federal income taxes, and between $7.8 million and $42 million in lost Social Security and Medicare taxes.[32] Ohio's 2009 task force found that 45% of employers misclassified workers, causing a loss of $12 to $100 million in unpaid taxes, $60 to $510 million in unpaid workers' compensation, and $21 to $248 million in unpaid state income taxes.[33]

Given the immense potential for cost to the public, independent contractor misclassification is an issue with uniquely bipartisan support. The U.S. Department of Labor devotes resources to fighting misclassification

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[31] CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, ANNUAL REPORT: FRAUD DETERRENCE AND DETECTION ACTIVITIES, REPORT TO THE CALIFORNIA LEGISLATURE (June 2008), available at http://www.edd.ca.gov/pdf_pub_ctr/report2008.pdf.

[32] NELP, *supra* note 2. *See also* TENNESSEE DEPARTMENT OF LABOR AND WORKFORCE, EMPLOYEE MISCLASSIFICATION EDUCATION AND ENFORCEMENT FUND (EMEEF), available at https://www.tn.gov/workforce/injuries-at-work/injured-workers/injured-workers/employee-misclassification.html.

[33] NELP, *supra* note 2, *citing* REPORT OF THE OHIO ATTORNEY GENERAL ON THE IMPACT OF MISCLASSIFIED WORKERS FOR STATE AND LOCAL GOVERNMENTS IN OHIO, Feb. 18, 2009, available at http://www.faircontracting.org/PDFs/prevailing_wages/Ohio_on_Misclassification.pdf.

throughout Republican and Democratic administrations[34] and as many as 30 states, spanning Republican and Democratic controlled state legislatures, have instituted laws, task forces, or committees aimed at combatting independent contractor misclassification.[35]

B. Misclassification harms law-abiding employers.

Employers that correctly classify workers as W-2 employees are often unable to compete with lower-bidding companies that reap the benefits of artificially low labor costs. As stated by the Treasury Inspector General, "worker misclassification . . . plac[es] honest

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[34] U.S. DEP'T OF LABOR, WAGE AND HOUR DIVISION, MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS, available at https://www.dol.gov/whd/workers/Misclassification/; U.S. DEPARTMENT OF LABOR, $10.2M AWARDED TO FUND WORKER MISCLASSIFICATION DETECTION, ENFORCEMENT ACTIVITIES IN 19 STATE UNEMPLOYMENT INSURANCE PROGRAMS, Sept. 2014, available at https://www.dol.gov/newsroom/releases/eta/eta20141708. In 2014, the DOL awarded misclassification detection grants to ten states in part to "protect the integrity of state unemployment insurance trust funds."

[35] NELP, *supra* note 2. *See also* CT HB 5113 (Pub. Act 08-105), SB 56 (2008); IL HB 1795 (Pub. Act 95-0026) (2008); IN SB 478 (P.L.164-2009); IA Exec. Order No. 8 (2008); ME Exec. Order 23 FY 08/09; MD Workplace Fraud Act of 2009; MA HB 1835 (2008); MI Exec. Order 2008-1 (2008); MN Advisory Taskforce on Employee Misclassification: Report to the 2011-12 Biennium, 87th Legislature; NC Exec. Order 125 (2012); NH SB 500 (2008), Exec. Order 2010-3; NJ Governor's Advisory Comm. on Construction Industry Independent Contractor Reform; NY Exec. Order 17 (2007); NV SCR 26 (BDR R-1297) (2009); OR HB 2815 (2009); RI SB 3099, HB 7907B (2008); UT SB 189 (2008), amended by S11 (2011); VT S.345 (2008), Exec. Order 08-12 (2012); WA SB 5926 (2007).

employers and businesses at a competitive disadvantage."[36] Although "some misclassification is the result of uncertainty . . . most of the cases involving misclassification were done on purpose in order to gain a competitive advantage over employers that obey the law."[37] This is especially a problem in delivery services, construction, janitorial, home care, and other labor-intensive low-wage sectors, where employers can gain competitive advantage by driving down payroll costs. Misclassification, especially when pervasive in an industry, skews markets and can drive responsible employers out of business. Law-abiding employers also suffer from inflated unemployment insurance and workers' compensation costs, as "free riding" employers that misclassify employees as independent contractors pass off costs to employers that play by the rules.

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[36] TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, ADDITIONAL ACTIONS ARE NEEDED TO MAKE THE WORKER MISCLASSIFICATION INITIATIVE WITH THE DEPARTMENT OF LABOR A SUCCESS, Feb. 20, 2018, available at https://www.treasury.gov/tigta/iereports/2018reports/2018IER002fr.pdf. *See also* David Weil, "Lots of Employees Get Misclassified as Contractors. Here's Why It Matters." Harvard Business Review, 5 July 2017, available at https://hbr.org/2017/07/lots-of-employees-get-misclassified-as-contractors-heres-why-it-matters ("[W]hen misclassification is adopted as a business strategy by some companies, it quickly undermines other, more responsible employers who face costs disadvantages arising from compliance with labor standards and responsibilities").

[37] David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, RUTGERS JOURNAL OF LAW & POLICY 12:1 (2015), available at http://www.ntassoc.com/uploads/files/Bauer_Misclassification_Contractors.pdf.

A 2010 study estimated that misclassifying employers burden society and other law-abiding businesses by evading $831.4 million in unemployment insurance taxes and $2.54 billion in workers' compensation premiums annually.[38]

C. Misclassification harms workers, deprives them of essential workplace protections, and depresses their income.

When employers unlawfully misclassify employees, they deprive them of the core workplace protections that Congress and the states intended as baseline standards. Misclassification denies workers the entire span of protections that most take for granted: workers' compensation if they are injured on the job, unemployment insurance, minimum wage and overtime protections, and protections against discrimination and sexual harassment.[39] While employers profit from misclassification, workers bear the cost: as a result of their outsized tax burden, unreimbursed

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[38] NELP, *supra* note 2, *citing* Douglas McCarron, "Worker Misclassification in the Construction Industry," BNA Construction Labor Report (Apr. 7, 2011), available at https://web.carpenters.org/Libraries/PDFs_Misc/Construction_Labor_Report_-_McCarron_on_Misclassification_4-7-2011_sm.aflb.ashx.

[39] NELP, *supra* note 2. The federal Department of Labor notes on its website that misclassified employees "often are denied access to critical and protections they are entitled to by law, such as the minimum wage, overtime compensation, family and medical leave, unemployment insurance, and safe workplaces." U.S. DEP'T OF LABOR, WAGE AND HOUR DIVISION, MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS, available at https://www.dol.gov/whd/workers/Misclassification/.

business expenses, and the prevalence of wage and other violations, misclassified workers' net income is often significantly less than for similar workers paid as employees. The differences are striking: one government expert calculated that a construction worker earning $31,200 a year before taxes would be left with an annual net compensation of $10,660.80 if paid as an independent contractor, compared to $21,885.20 if paid properly as an employee.[40] A study on port truck drivers found that annual median net earnings before taxes were $28,783 for drivers paid as contractors as compared with $35,000 for employees.[41]

In the port trucking industry, the typical port truck worker is misclassified[42] and the abuses engendered by misclassification are particularly stark. The economic

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[40] NELP, *supra* note 2, *citing* TIM CROWLEY, UI TAX CHIEF, U.S. DEPARTMENT OF LABOR, WORKER MISCLASSIFICATION – AN UPDATE FROM CONSTITUTION AVE. (Oct. 24, 2012), available at http://www.naswa.org/assets/utilities/serve.cfm?gid=86824dbe575c-4edb-9e93-444cef85c837&dsp_meta=0.

[41] NELP, *supra* note 2, *citing* REBECCA SMITH, PAUL ALEXANDER MARVY & JON ZEROLNICK, THE BIG RIG OVERHAUL: RESTORING MIDDLE-CLASS JOBS AT AMERICA'S PORTS THROUGH LABOR LAW ENFORCEMENT 12 (2014), available at http://www.justice4ladrivers.net/BigRigOverhaul2014Finalsm.pdf.

[42] SMITH et al., *supra* note 10. Between 2010 and June 2017, 1,150 port truck drivers have filed claims in civil court or with the California Department of Labor Standards Enforcement. Judges have sided with drivers in more than 97% of the cases heard, ruling that port truckers were unlawfully misclassified as independent contractors. Brett Murphy, *Rigged: Forced into Debt. Worked past exhaustion. Left with nothing*, USA TODAY, June 16, 2017, available at https://www.usatoday.com/pages/interactives/news/rigged-forced-into-debt-worked-past-exhaustion-left-with-nothing/.

conditions of the industry are such that economists, reporters, and advocates have described the system as "modern-day indentured serv[itude]," "sweatshops on wheels," and "sharecroppers on wheels."[43] Through independent contracting agreements and leases, trucking companies make drivers responsible for all truck-related expenses including truck purchase, fuel, taxes, insurance, maintenance, and repair costs.[44] As a result of these exploitative contracts, at best, port truck drivers work long hours for poverty level wages – and at worst, drivers have lost money, and been forced into debt or bankruptcy by exploitative contracts.[45]

The exploitative and often unlawful deductions facilitated by independent contractor misclassification can be shocking. For example, Samuel Talavera Jr., a port truck driver in Los Angeles, grossed $1,970 on a 2011 paycheck. However, as an independent contractor,

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[43] Murphy, *supra* note 42 (describing the leasing arrangement as modern-day indentured servitude and citing civil rights leader Julian Bond describing California port truckers the new black tenant farmers of the post-Civil War South); Steve Viscelli, *Truck Stop: How One of America's Steadiest Jobs Turned Into One of Its Most Grueling*, THE ATLANTIC, May 10, 2016, available at https://www.theatlantic.com/business/archive/2016/05/truck-stop/481926/ (sociology professor stating industry economist describes contemporary trucking as "sweatshops on wheels"); REBECCA SMITH, DAVID BENSMAN, AND PAUL MARVY, THE BIG RIG: POVERTY, POLLUTION, AND THE MISCLASSIFICATION OF TRUCK DRIVERS AT AMERICA'S PORTS, 2010, available at https://www.nelp.org/wp-content/uploads/2015/03/PovertyPollutionandMisclassification.pdf (describing the industry as "sharecroppers on wheels").

[44] SMITH et al., *supra* note 43.

[45] SMITH et al., *supra* note 43; Murphy, *supra* note 42.

the money largely went back to his employer. After the lease and other truck expenses were deducted, he took home $33. In another 2012 paycheck, he made 67 cents.[46] For Rene Flores, a port truck driver in California, deductions and long hours – often 12 to 20 hours straight behind the wheel – can translate to a wage of $3 an hour, well below minimum wage.[47] Although a driver often initially perceives truck leasing arrangements to be akin to a mortgage, the terms in reality mean that a driver can end up losing tens of thousands of dollars in unlawfully deducted wages. When driver Talavera could not afford repairs on his truck, the company fired him and seized the truck – along with $78,000 he had paid towards owning it.[48] Max Galvan, a port truck driver in Southern California, similarly describes losing his truck after paying $35,148 in weekly lease payments.[49] As noted by one California labor commission hearing officer, "the truck was never [the driver's, and] he has nothing to show for all the time and money he spent."[50] Port trucking is a paradigmatic example of the ways in which misclassification hurts workers.

Across industries, an employer's insistence on labeling workers as contractors in itself deters workers

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[46] Murphy, *supra* note 42.

[47] *Id.*

[48] *Id.*

[49] Smith et al., *supra* note 43.

[50] Murphy, *supra* note 42.

from claiming rights under workplace laws that rely on individual complaints for enforcement, as workers tend to assume that their employer has classified them accurately.[51] Occupations with high rates of misclassification are also among the jobs with the highest numbers of workplace violations.[52] Anecdotal studies of working conditions for workers misclassified as independent contractors by their employers show elevated rates of wage theft and workplace injury.[53] Many workers incorrectly believe that they do not have an employer and are unable to navigate the intricacies of companies' contracting relationships to ascertain who

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[51] Workers who believe they are not eligible for workplace protections will likely not go to an enforcement body. The vast majority of DOL's Wage & Hour Division's (WHD) enforcement actions are triggered by worker complaints. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-962T, BETTER USE OF AVAILABLE RESOURCES AND CONSISTENT REPORTING COULD IMPROVE COMPLIANCE 7 (July 15, 2008) (72% of WHD's enforcement actions from 1997-2007 were initiated in response to complaints from workers); David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Pol'y J. 59, 59-60 (2005) (finding that in 2004, complaint-derived inspections constituted about 78% of all inspections undertaken by WHD). Anecdotally, advocates report to NELP that misclassification is often used by employers in combination with non-compete and non-disclosure or confidentiality provisions to intimidate and discourage low-wage workers, who often speak little or no English, from complaining or joining together to improve wages and conditions.

[52] *See* NATIONAL EMPLOYMENT LAW PROJECT, HOLDING THE WAGE FLOOR, Oct. 1, 2005, available at http://www.nelp.org/content/uploads/2015/03/Holding-the-Wage-Floor2.pdf.

[53] NELP, *supra* note 2.

is responsible for workplace violations. When there is no clear line of accountability, work conditions are more likely to deteriorate: pay declines, wage theft increases, and workplace injuries rise. Real-life examples abound, not only in trucking and delivery, but across the economy, in industries from construction to home care.[54]

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[54] *See, e.g.*, Murphy, *supra* note 42; SMITH et al., *supra* note 43; Brett Murphy, *Asleep at the wheel: Companies risk lives by putting sleep-deprived port truckers on the road*, USA TODAY, Dec. 28, 2017, available at https://www.usatoday.com/pages/interactives/news/rigged-asleep-at-the-wheel/. *See also* McClatchy DC, "Misclassified: Contract to Cheat," 2014, available at http://media.mcclatchydc.com/static/features/Contract-to-cheat/ (detailing the effects of misclassification within the construction industry); NATIONAL EMPLOYMENT LAW PROJECT, INDEPENDENT CONTRACTOR CLASSIFICATION IN HOME CARE, available at http://www.nelp.org/content/uploads/Home-Care-Misclassification-Fact-Sheet.pdf (detailing the effects of misclassification within the home care industry).

III. SHOULD THE COURT FIND THAT THE "CONTRACT OF EMPLOYMENT" ANALYSIS REQUIRES A DETERMINATION OF WHETHER A WORKER IS AN INDEPENDENT CONTRACTOR, THE DETERMINATION MUST CONSIDER ALL INCIDENTS OF THE RELATIONSHIP AND NOT BE LIMITED TO THE UNILATERALLY IMPOSED TERMS OF THE CONTRACT.

A. Prime's argument is squarely contrary to the common law approach to determining independent contractor status.

Prime's argument to ignore the facts of the relationship between the worker and the company that engages him to work is fully at odds with the long-standing approach under the common law to determining employee status, as outlined by the Supreme Court in *NLRB v. United Ins. Co. of America*, 390 U.S. 254 (1968) and *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).[55] *United Ins.* construed the exclusion of independent contractors from the definition of "employee" under the NLRA. 29 U.S.C. § 152(3). The Court discusses the various factors relied on at common law to distinguish employees from independent contractors, emphasizing there is "no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be

[55] *Darden* holds that if a statute does not set out a definition of employment, courts should use the common law test. The scope of the employment relationship under the FAA and NLRA are thus determined using the common law test. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

assessed and weighed with no one factor being decisive." 390 U.S. at 258. *See also Nationwide Mutual Ins. v. Darden*, 503 U.S. 318, 322, 324 (1992) (reaffirming both principles and citing *United Ins.* with approval).

Prime's argument, contrary to *United Ins.* and *Darden*, does not assess "all of the incidents" of the relationship, but focuses solely upon the terms of the unilaterally imposed "contract" between the driver and the putative employer. As shown in this case, in most lower-paid jobs, a driver and his or her employer do not bargain over terms and conditions in a contract: it is presented to the worker as a take-it-or-leave-it document, and most workers wanting a job take whatever the employer presents to them.[56]

For example, in *Green Fleet Systems, LLC*, JD(SF)-16-15 (ALJ J. Wedekind, Apr. 9, 2015),[57] NLRB Administrative Law Judge (ALJ) Wedekind considered whether port drivers working for Green Fleet under a lease agreement were "employees" for purposes of the NLRA. In deciding that they were, the ALJ noted that while the lease described the drivers as "independent contractors," the document had been drafted by a law firm retained by the employer for that purpose and had been presented to the Spanish-speaking drivers in English "for signature at the time they were retained, and all of the lease drivers signed it without any

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[56] SMITH et al., *supra* note 10; SMITH et al., *supra* note 43; J.A. 118, 156.

[57] Available at *nlrb.gov/Cases & Decisions/Administrative Law Judge Decisions* and at Westlaw, 2015 WL 1619964.

negotiations or changes." JD(SF)-16-15, slip op. at 40. For this reason, the ALJ did not afford the language of the lease any weight in determining the drivers' status. JD(SF)-16-15, slip op. at 50.

Similarly, the ALJ in *Intermodal Bridge Transport*, JD(SF)-48-17 (ALJ D. Montemayor, Nov. 28, 2017),[58] found the employer presented drivers with a lease document in English, despite the fact that it knew most drivers did not speak English, and did not offer translation services. Drivers were simply instructed where to sign and initial the lease and given a sample lease with the blanks filled in that they could copy. JD(SF)-48-17, slip op. at 5. The ALJ concluded that, even though the lease agreements referred to the drivers as "independent contractors," the terms of the agreements carried little weight because the agreements were "unilaterally created and imposed by IBT [Intermodal Bridge Transit]" so that drivers had no opportunity to bargain about the terms of the lease. JD(SF)-48-17, slip op. at 17.[59]

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[58] Available at *nlrb.gov/Cases & Decisions/Administrative Law Judge Decisions* and at Westlaw, 2017 WL 5852765. The case is pending on exceptions to the NLRB.

[59] *See also National Freight, Inc.*, 153 N.L.R.B. 1536, 1537-1540 (1965) (finding employee status, based on nature of relationship, despite fact lease agreement designated drivers as independent contractors); *Adderley Industries, Inc.*, 322 N.L.R.B. 1016, 1023 (1997) (finding electrician to be employee, based on nature of underlying relationship, despite fact workers signed "Independent Contractor Agreement" prepared by employer); *Sister Camelot*, 363 N.L.R.B. No. 13 (2015), slip op. at 6 (giving little weight to agreements designating workers as independent contractors because evidence showed workers "did not have the opportunity to bargain

B. Prime's argument is not supported by the statute.

Prime and its Amici argue that, in determining what constitutes a "contract of employment" for purposes of Section 1 of the FAA, the statutory language "compels a factfinder to take a 'categorical approach that focuses solely on the words of the contract and the definition of the relevant category.'" Petitioner's Brief on the Merits at p. 29, citing and quoting *In re Swift Transportation Co.*, 830 F.3d 913, 920 (9th Cir. 2016) (Ikuta, J., dissenting). This approach is completely contrary to the way labor and employment relationships are assessed, and would radically rewrite decades of authority holding that contractual terms by themselves do not dictate the status of an employment relationship.

Prime would like to avoid any analysis of the actual facts regarding trucking companies' relationships with their drivers and to permit the companies to unilaterally declare drivers to be "independent contractors," thus rendering them ineligible for the exemption granted by Congress to transportation workers. The Court should decline this invitation to radically rewrite the common law and reaffirm that, in determining employee status, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Nationwide Mut. Ins. Co. v.*

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over the terms of the agreements."); *NLRB v. United Ins.*, *supra*, at 259 (finding workers to be employees, in part, because the "terms and conditions under which [the workers] operate is promulgated and changed unilaterally by the company . . . ").

Darden, 503 U.S. 318, 324 (1992) (internal citations omitted).

Prime argues that had Congress intended the exemption in Section 1 to turn on the nature of the relationship between the parties rather than solely on the terms of the contract, it would have used language similar to that found in Section 2 of the FAA, which refers to "[a] written provision in any maritime transaction or a contract *evidencing a transaction* involving commerce . . . " (emphasis added). Petitioner at p. 30-31. But contrary to Prime's argument, examining the underlying relationship with regard to "a contract of employment" does not render the language in Section 2 mere surplusage. Section 2 sets forth the basic principle of the statute – that arbitration clauses in contracts involving interstate commerce are to be enforced – while Section 1 sets forth pertinent definitions and exceptions from coverage. Thus, Section 2 requires that an arbitration provision in a contract involving "commerce" must be enforced, while Section 1 exempts such contracts if they are a contract of employment "of seamen, railroad employees, or other class of workers engaged in foreign or interstate commerce."

Neither of the cases cited by Prime support its argument. *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995) did not address employment contracts, but involved an arbitration provision in a termite prevention contract and simply held that the words "evidencing" in Section 2 demonstrated Congressional intent to extend the FAA's reach to the limits of the Commerce Clause. *Allied-Bruce* cited and

relied on the Court's earlier decision *Bernhardt v. Polygraphic Company of America*, 350 U.S. 198 (1956). While *Bernhardt* dealt with an arbitration provision in an employment contract, the holding does not support Prime's reading of the statute. *Bernhardt* focused on the proper interpretation of Section 2 and concluded the FAA did not apply to the contract at issue there since the work performed by the employee did not involve interstate commerce. 350 U.S. at 201. Hence, the Court in *Bernhardt* did not consider or apply the exemption set forth in Section 1.

Prime's argument suggests that Congress intended the term "contract" in Section 1 to mean something different than "contract" in Section 2. This is contrary to the long-standing canon of statutory construction that "identical words used in different parts of the same act are intended to have the same meaning." *Department of Revenue of Ore. v. ACF Industries, Inc.*, 510 U.S. 332 (1994).

CONCLUSION

For the foregoing reasons, the Court should affirm the opinion of the First Circuit.

Dated: July 25, 2018

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No. 17-340

In the Supreme Court of the United States

NEW PRIME, INC.,
Petitioner,

v.

DOMINIC OLIVEIRA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF MASSACHUSETTS, CALIFORNIA, CONNECTICUT, THE DISTRICT OF COLUMBIA, ILLINOIS, MARYLAND, MINNESOTA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OREGON, PENNSYLVANIA, VERMONT, VIRGINIA, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*

State *amici* enforce laws that protect the public interest, including those that set fair labor standards and promote the health and safety of all working people. We also share a responsibility to protect workers who are susceptible to exploitation, and to foster a level playing field for businesses who abide by the laws. Employees who are misclassified as independent contractors are often denied many basic workplace protections and benefits that they are entitled to receive—and employers who fail to properly classify and pay their workers gain an unfair competitive advantage by avoiding payroll costs including tax contributions to federal and state governments.[1] As the U.S. Department of Labor explains, "[e]mployee misclassification generates substantial losses to the federal government and state governments in the form of lower tax revenues, as well as to state unemployment insurance and workers' compensation funds." U. S. Department of Labor, Wage & Hour Division, *Misclassification of Employees as Independent Contractors*, https://www.dol.gov/whd/workers/misclassification (July 17, 2018).

We have taken steps to combat employment misclassification and its resulting harms. However, because States have limited resources, we rely on individual employees to supplement our efforts

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[1] *See, e.g.*, National Employment Law Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* (July 2015) at 2-6, https://www.nelp.org/wp-content/uploads/Independent-Contractor-Costs.pdf.

through private enforcement actions. *Amici* accordingly recognize that workers must have a meaningful role in vindicating their own rights and ensuring compliance in the business community, not only to protect themselves, but also to expand enforcement of workplace protections across entire industries.

Employment misclassification has become particularly prevalent among drivers in the transportation industry.[2] For decades, businesses in the transportation sector (among others) have imposed "take-it-or-leave-it" independent contractor agreements with mandatory arbitration provisions on their workers[3]—more than half of the companies in this sector now require them.[4] And many

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[2] *See, e.g.*, *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981 (9th Cir. 2014); *Valadez v. CSX Intermodal Terminals, Inc.*, 2017 WL 1416883 (N.D. Cal. April 10, 2017); *Taylor v. Shippers Transp. Express, Inc.*, 2014 WL 7499046 (C.D. Cal. Sept. 30, 2014); *Anderson v. Homedeliveryamerica.com, Inc.*, 2013 WL 6860745 (D. Mass. Dec. 30, 2013); *Martins v. 3PD, Inc.*, 2013 WL 1320454 (D. Mass. Mar. 28, 2013); *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1 (Cal. 2018); *Amero v. Townsend Oil*, 2008 WL 5609064 (Mass. Super. Ct. Dec. 3, 2008).

[3] *See* Leberstein and Ruckelshaus, National Employment Law Project, *Independent Contractor vs. Employee: Why independent contractor misclassification matters and what we can do to stop it* (May 2016), https://nelp.org/content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf.

[4] *See* Alexander Colvin, Economic Policy Institute, *The Growing Use of Mandatory Arbitration*, at 1, 3, 8 (April 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-

transportation companies engage in exploitative labor practices while at the same time using mandatory arbitration agreements with unreasonable forum selection clauses to attempt to prevent their misclassified drivers from pursuing otherwise available legal remedies.[5] As workers are increasingly forced to submit their employment disputes to arbitration, overall claim volume has significantly decreased and the few claims brought are removed from public view.[6] This hampers the effectiveness of States' enforcement efforts. Accordingly, *amici* have a strong interest in ensuring

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arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/.

[5] *See, e.g.*, *Montoya v. CRST Expedited, Inc.*, 2018 WL 627372 (D. Mass. Jan. 30, 2018) (striking forum selection clause requiring litigation in Iowa for unpaid-wage putative class action by Massachusetts-residing truck driver); *Chebotnikov v. LimoLink, Inc.*, 150 F. Supp. 3d 128 (D. Mass. 2015) (denying employer's motion to dismiss misclassification-wage action on venue grounds, where Massachusetts chauffeurs' independent contractor arbitration agreements specified Iowa as forum). Oftentimes drivers are not even signatories to these agreements. *See, e.g.*, *Ouadani v. TF Final Mile, LLC*, 876 F.3d 31 (1st Cir. 2017) (arbitration clause unenforceable in wage and hour class action, where drivers, paid through a subcontractor, were not actually parties to, nor even knew of, the arbitration agreement between subcontractor and putative employer); *Espinal v. Bob's Discount Furniture, LLC*, 2018 WL 2278106 (D.N.J. May 18, 2018) (same); *Hayes v. XPO Last Mile, Inc.*, 2017 WL 4900387 (W.D. Mich. Aug. 21, 2017) (denying motion to compel individual arbitration where drivers were non-signatories).

[6] *The Growing Use of Mandatory Arbitration*, *supra* n.4, at 11, 12.

that workers not subject to compulsory arbitration have the ability to bring their claims in court.

Now, in a new variant on this unfortunate trend, Petitioner New Prime, Inc. ("New Prime") argues that only "employees" in the transportation industry may avail themselves of the exemption Congress specifically extended to all transportation "workers" in Section 1 of the Federal Arbitration Act (FAA). Yet, just like traditional employees, many of the nation's independent truck drivers have experienced abusive economic practices at the hands of large motor carriers. *See Global Van Lines, Inc. v. ICC*, 627 F.2d 546, 547-58 (D.C. Cir. 1980).

Indeed, although Congress formerly provided drivers with an administrative dispute resolution process to address their claims, Congress subsequently replaced that process in recognition of the disparities in the bargaining positions between motor carriers and truck drivers. *See Owner-Operator Indep. Drivers Ass'n, Inc. v. New Prime, Inc.*, 398 F. 3d 1067, 1070 (8th Cir. 2005). In 1995, Congress expressly gave truck drivers the right to bring private civil actions in court for certain violations of the Truth–in–Leasing Act and its regulations. Interstate Commerce Commission Termination Act of 1995, Pub. L. 104–88, 109 Stat. 803; 49 U.S.C. § 14704. This private right of action applies to owner-operators and traditional "employees" alike. 49 C.F.R. § 376.12(c)(1), (4). New Prime's theory would deprive not only true owner-operators, but also employees who have been misclassified as independent contractors, of their rights under that statute.

New Prime's position is thus at odds with the FAA's "worker"-protecting text, and, if accepted, would harm the interests of *amici* in seeing extensive private enforcement of both state and federal workplace protection laws. It was for Congress to decide when arbitration agreements should be enforced and who should be able to seek redress in court, and Congress chose to exempt transportation workers from the scope of the Act. State *amici* have an interest in seeing that transportation sector workers such as Respondent Dominic Oliveira get their day in court, as Congress intended.

SUMMARY OF ARGUMENT

The language of the FAA's transportation workers exemption excludes interstate truck drivers from the FAA's scope—regardless of whether they are employees or independent owner-operators. This conclusion becomes especially clear in light of the history surrounding Congress's regulation of leases between independent truck drivers and authorized motor carriers.

A. When Congress passed the FAA in 1925, the phrase "class of workers" appearing in Section 1's transportation exemption was commonly understood to include both employees and independent contractors. That phrase has continually been used by several federal agencies to signify categories of workers based on their income source, including the self-employed, *i.e.*, independent contractors working on their "own account," as well as traditional hourly and salaried employees. This meaning is consistent

with the reality of the trucking industry at that time (and now): an industry comprised of both employees and independent owner-operator truck drivers—and more of the latter than the former. Moreover, if Congress had wanted to limit the transportation exemption only to conventional employer-employee relationships, it could easily have done so by simply repeating the word "employee" in Section 1's residual clause. Instead, as written, the FAA's transportation exemption applies to all interstate truck drivers—regardless of whether they are classified as employees or independent contractors.

B. Congress chose to exempt transportation workers from the FAA to avoid conflicts with either existing or developing statutory dispute resolution mechanisms. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 (2001). And, by passing the Motor Carrier Act of 1935, Pub. L. 74-255, 49 Stat. 543, Congress began its regulation of the emerging trucking industry, including an administrative dispute resolution process similar to legislation Congress adopted for interstate transport by water, rail, and air. But, unlike the other regulated transportation sectors, the interstate trucking industry was mostly composed of independent truck drivers—known as "owner operators"—rather than conventional employees. Congress recognized this distinction by expressly regulating the relationships between for-hire carriers and owner-operators. In other words, as this Court recognized in *Circuit City*, Congress would act soon after passing the FAA to regulate other transportation workers beyond those spelled out in Section 1—and it did so in 1935 for

truckers, including independent contractors. Accordingly, independent drivers who contract with trucking firms, such as through the leases at issue here between New Prime and Oliveira, are excluded from the FAA.

ARGUMENT

Section 1 exempts truck drivers from the FAA regardless of whether they are employees or independent contractors.

Statutory interpretation is always to some extent a historical inquiry. This Court recently reaffirmed the "fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary, contemporary, common meaning ... at the time Congress enacted the statute." *Wisconsin Cent. Ltd. v. United States*, 585 U.S. __, 2018 WL 3058014, at *6 (June 21, 2018) (citation and internal quotation marks omitted). With respect to the FAA, history is relevant in a second way: this Court in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), looked to the nature and extent of congressional regulation of the existing and emerging transportation industries near the time of the FAA's enactment to inform the Court's interpretation of the Section 1 exemption. Both historical inquiries lead to the conclusion that with respect to truck drivers, Congress meant to exempt from the FAA employees *and* independent contractors.

The FAA excludes from its scope "contracts of employment" of any "class of workers" in interstate transportation. 9 U.S.C. § 1; *see Circuit City*, 532

U.S. at 109 (interpreting Section 1's exemption as "confine[d] . . .to transportation workers"). Congress thus stated a clear policy that federal courts may not require such "workers" in the transportation sector to arbitrate their disputes. New Prime seeks to undo Congress's policy choice in two ways: by allowing an arbitrator to decide the scope of the exemption in the first instance, and by preventing truck drivers treated as independent contractors from invoking it.

Both of New Prime's arguments are foreclosed by the FAA's plain language, read in its proper historical context. *Amici* agree with Oliveira's compelling argument on the first question presented, *see* Resp. Br. 15-23, and will not repeat it. On the second, *amici* here show that, at the time of the FAA's enactment, Congress would have understood the term "class of workers" to include both employees and independent contractors, thus indicating that the exemption applies to both types of transportation workers. Moreover, soon after the FAA's enactment, Congress began considering legislation covering conditions in the emerging trucking industry. This Court recognized in *Circuit City* that Congress wanted to exclude transportation workers from the FAA so as not to interfere with "established or developing dispute resolution" legislation affecting these "specific workers." 532 U.S. at 121. As explained below, the trucking industry meets that description: Congress repeatedly considered and finally enacted legislation that applies to both independent contractors and employees, demonstrating the full scope of "workers" in the industry exempted from the FAA.

A. The Congress that enacted the FAA would have understood the phrase "class of workers" in Section 1 to include independent truck drivers.

Section 1 excludes from the FAA's coverage "*contracts of employment* of seamen, railroad employees, or any other *class of workers* engaged in foreign or interstate commerce." 9 U.S.C. § 1 (emphasis added). As Oliveira convincingly shows, the Congress that enacted the FAA would have understood the term "contracts of employment" to mean "agreements to perform work"—a phrase that readily encompasses agreements with independent contractors. *See* Resp. Br. 23-31, 37. The historical understanding of the term "class of workers" in Section 1's residual clause is equally clear, and equally supportive of Oliveira. Had Congress intended to limit the residual clause to conventional employer-employee relationships, it could easily have done so in terms that were widely used at the time. Instead, as written, the FAA transportation workers exemption applies to all interstate truck drivers—including independent owner-operators.

Although the FAA does not define it, the phrase "class of workers" has been in continual use since as early as 1910 by several federal agencies to signify various categories of workers—including those working as independent contractors. For example, the Census Bureau required its enumerators to place individuals into a "class of worker" category, including traditional employees, unpaid family workers, and self-employed persons "[w]orking on

own account" (referred to as "independent workers"). *See* U.S. Dep't of Commerce, Fifteenth Bureau of the Census, Instructions to Enumerators, at 37-38 (1930) (instructions regarding "class of worker"), https://www.census.gov/history/pdf/1930instructions.pdf; *Morales v. Daley*, 116 F. Supp. 2d 801, 808 (S.D. Tex. 2000) (noting that "[q]uestions on the class of worker, that is, type of employment, whether private, governmental, self employed [sic], or working as an unpaid family worker, have appeared on the census form since 1910").

The phrase "class of worker" has also long been used by the U.S. Department of Labor's Bureau of Labor Statistics to encompass both employees and independent contractors. *See, e.g.*, Bureau of Labor Statistics, Bull. No. 817 at pp. 8, 10, 12-13, 15, 19, 32 (Feb. 1945) (making "class of worker" comparisons between hourly/salaried workers and self-employed "own-account workers," based on census data from 1940), https://lccn.loc.gov/l45000048; Bull. No. 968 at p. 75 (May 1949) (reporting on self-employed independent consultants), https://fraser.stlouisfed.org/files/docs/publications/bls/bls_0968_1950.pdf.[7]

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[7] The Bureau of Labor Statistics also used this phrase around the time of the passage of the FAA when making comparisons between skilled and unskilled groups of workers within the same or similar industries, without distinguishing between employees and independent contractors in that context. *See, e.g.*, BLS Monthly Labor Rev., Vol. 15, No. 3 at p. 129 (Sept. 1922); Monthly Labor Rev., Vol. 16, No. 6 at p. 131 (June 1923); Monthly Labor Rev., Vol. 34, No. 1 at p. 179 (Jan. 1932); Monthly Labor Rev., Vol. 34, No. 3 at pp. 669-670 (Mar. 1932); Monthly Labor Rev., Vol. 35 at p. 1300 (July-Dec. 1932).

Cf. Bureau of Labor Statistics, Economic News Release, Table A-8, "Employed persons by class of worker and part-time status," (May 4, 2018) (categorizing workers by wage and salary, unincorporated self-employed, unpaid family workers, government, private industries, and private households), https://www.bls.gov/news.release/empsit.t08.htm.[8] Thus, at the time it enacted the FAA, Congress would have understood the phrase "class of workers" to include independent contractors.

Had Congress intended to limit Section 1's residual clause only to traditional common law employer-employee relationships, it would likely have chosen more specific language to do so. For example, Congress could easily have written the clause to exempt "contracts of employment of seamen, railroad employees, or any other *class of employees* engaged in foreign or interstate commerce." That phrasing would have made grammatical sense and would have been perfectly consistent with contemporary usage. Indeed, after

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[8] The same meaning for the phrase has also been used in the context of categorizing workers for federal employment tax purposes. *See* Committee on Ways & Means, H. Rep. 95-1748, at 3 (1978), 1978-3 C.B. (Vol. 1) at 631 (explaining that "the classification of particular workers or classes of workers as employees or independent contractors (self-employed persons) for purposes of Federal employment taxes must be made under common law rules"). And this Court used the phrase in referring to the Social Security Act Amendments of 1950, which "extend[ed] coverage to *specified classes of workers* irrespective of their common-law status." *United States v. W.M. Webb, Inc.*, 397 U.S. 179, 186 n.12 (1970) (emphasis added) (citing S. Rep. 1669, 81st Cong., 2d Sess. (1950), 1950–2 C.B. 302, 346–347).

enacting the FAA, Congress used the phrase "class of employees" in another transportation-related context—the Railway Labor Act, 45 U.S.C. § 152, Fourth (as amended by Act of June 21, 1934, Pub. L. 73-442, 48 Stat. 1185)—to refer to collective bargaining groups for related occupational categories of employees: "The majority of any craft or *class of employees* shall have the right to determine who shall be the representative of the craft or class for the purposes of this [Act]." *Id.* (emphasis added). Congress also—both before and after the FAA's enactment—used the phrase "class of employees" when comparing employees within similar industries, occupations, or employing units. *See, e.g.*, Hearing on H.R. No. 11019, 62nd Cong., 1st Sess., 2060 (1911) (using "class of employee" as the title for occupational wage comparison chart); H.R. No. 388, 62nd Cong., 2d Sess., 5199 (1912) (using "class of employees" in reference to mail clerks, letter carriers, and other postal employees); Hearing on H.R. No. 11133, 70th Cong., 1st Sess., 3380 (1928) (using phrase "class of employees" in summary chart comparing pension and retirement laws for police, fire fighters, and civil clerks).

The Congress that enacted the FAA selected the phrase "class of workers" rather than limiting Section 1's residual clause to employees. As this evidence shows, Congress would have understood the phrase to include both traditional employees and self-employed independent truck drivers. This Court, too, should follow the phrase's "ordinary, contemporary, common meaning ... at the time Congress enacted the

statute," *Wisconsin Cent.*, 585 U.S. at __, 2018 WL 3058014, at *6, in interpreting Section 1.

B. Congress exempted certain workers from the FAA because it wished to "reserv[e] for itself more specific legislation for those engaged in transportation"—including independent truck drivers.

The regulatory development of the nation's interstate transportation sectors further supports the statutory construction described above. Similar to legislation Congress adopted for interstate transport by water, rail, and air, Congress also created an administrative dispute resolution process for the trucking industry.

In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), this Court looked to "Congress' demonstrated concern with transportation workers and their necessary role in the free flow of goods" as the basis for its interpretation of the Section 1 exemption. 532 U.S. at 121. The Court noted that federal regulation of grievance procedures for seamen and railroad employees—the two types of workers specifically referenced in Section 1—already "existed" when Congress enacted the FAA in 1925. *Id.* (citing the Shipping Commissioners Act of 1872, 17 Stat. 262, and the Transportation Act of 1920, §§ 300-316, Pub. L. 66-152, 41 Stat. 456). The Court thus inferred that Congress exempted such employees from the FAA "for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers." *Id.* at

121. The Court then explained the residual clause by noting that specific legislation for transportation workers other than the "two specific, enumerated types" in Section 1 "was soon to follow," citing as an example "the amendment of the Railway Labor Act in 1936 to include air carriers and their employees." *Id.* (citing Pub. L. 74-487, 49 Stat. 1189, 45 U.S.C. §§ 181-188). The Court concluded that "[i]t would be rational for Congress to ensure that workers in general would be covered by the provisions of the FAA, while reserving for itself more specific legislation for those engaged in transportation"—even those working in transportation fields not yet covered by federal legislation. *Id.*

Just as the air carrier sector was emerging when the FAA was enacted, so too was the trucking industry. Shortly after the FAA's passage, Congress began contemplating "more specific legislation" to address the emerging trucking industry through what ultimately became the Motor Carrier Act of 1935 (MCA), Pub. L. 74-255, 49 Stat. 543, https://www.loc. gov/law/help/statutes-at-large/74th-congress/session-1/c74s1ch498.pdf. Through the first several decades of the twentieth century, the nation's trucking system was "rapidly changing," *Maurer v. Hamilton*, 309 U.S. 598, 615 (1940). Improved roadways, as well as mechanical inventions such the pneumatic tire and the internal combustion engine, brought "sensational growth to the industry." Paul Stephen Dempsey, *Transportation: A Legal History*, 30 Transp. L.J. 235, 274 (2003). Before long, Congress recognized that it needed to regulate this expanding transportation sector. *See* John J. George, *Federal Motor Carrier Act of 1935*, 21 Cornell L. Rev.

249, 251 (1936).[9] Proposals for federal regulation emerged in 1926, shortly after the FAA's passage, and were introduced each session, *id.* at 251-52, until 1935, when Congress passed the Motor Carrier Act. Congress thus undertook a similar path in the regulation of the trucking industry as it had with other interstate transportation sectors.

The MCA was Congress's first regulation of interstate commercial motor vehicle traffic. At that time, truck drivers were predominantly small independent owner-operators who often contracted with motor carriers through leasing arrangements. *See, e.g., Am. Trucking Ass'ns, Inc. v. United States*, 344 U.S. 298, 303-304, 312 (1953). Through the MCA, Congress sought to oversee this new form of interstate traffic "whose regulatory problems bear little resemblance" to other systems of transportation previously subjected to Congressional control, and that presented challenges "far exceeding those of any earlier regulations of interstate commerce." *Maurer*, 309 U.S. at 604. Indeed, although jurisdiction over the motor carrier industry was given to the ICC—the same agency responsible for regulating the railroads—the two transportation industries "could hardly have been more dissimilar." *Federal Regulation of Trucking: The Emerging Critique*, 63

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[9] Among the forces prompting congressional action were "the magnitude of interstate motor transportation, inability of the states to control it adequately, the resulting injurious effects of unregulated interstate motor activity on regulated intrastate operation, on railroads, their employees, and shippers, on highway taxpayer-users, and on the increasing urgency of problems of public safety on the highways." *Id.*

Colum. L. Rev. 460, 468 (1963). Distinctions between them were mainly due to significant differences in start-up costs, which directly affected competition: the railroad system was dominated by only a few large companies due to the expense needed to gain entry, but the trucking industry was made up of many thousands of small firms owing to the minor initial investment required.[10] *Id.* (citing Eastman, *Regulation of Transportation Agencies, Second Report of the Federal Coordinator of Transportation*, S. Doc. No. 152, 73rd Cong. 2d Sess. 28 (1934)).

"A down payment on a truck and a driver's license were all it took to get into the industry." *Transportation: A Legal History*, 30 Transp. L.J. at 281. As a result, when the MCA was enacted, a substantial portion of the nation's truck drivers were independent owner-operators with just one vehicle. *See, e.g.*, Harold Barger, National Bureau of Economic Research, *The Transportation Industries, 1889-1946: A Study of Output, Employment, and Productivity*, Appendix F: Highways—The Motor Trucking Industry, at 223-24 (1951) (reporting American Trucking Associations' estimate that "82 percent of all for-hire trucking enterprises operated

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[10] It was estimated that such firms had on average only 2.55 trucks each. Senate Committee Hearings on Interstate Commerce, on S. 1629, S. 632, and S. 1635, 74th Cong., 1st Sess., Part I, 325 (1935); Hearings on H.R. 5262 and H.R. 6016 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess. 175 (1935). Less than two per cent of trucking firms had more than 10 workers. 1935 *Senate Hearings* at 212-13; 1935 *House Hearings* at 162-63.

just one vehicle in 1935."), http://www.nber.org/chapters/c3200.pdf. Often such drivers were unsophisticated entrepreneurs unable to estimate adequately their own operating costs, and many fell victim to carriers' exploitative practices. *See Transportation: A Legal History*, 30 Transp. L.J. at 281, 285. Although many went bankrupt, the Great Depression created a steady pool of new entrants willing to purchase vehicles and repeat the cycle. *Id.* at 284-85.

Thus, as this Court has observed, at the time of the MCA's enactment, "the industry was unstable economically, dominated by ease of competitive entry and a fluid rate picture. And, as a result, it became overcrowded with small economic units which proved unable to satisfy even the most minimal standards of safety or financial responsibility." *Am. Trucking Ass'ns, Inc.*, 344 U.S. at 312. Congress intended to address these problems by enacting the MCA, which extensively regulated the relationships between owner-operators and authorized motor carriers. *See* Senate Committee Hearings on Interstate Commerce, on S. 1629, S. 1632, and S. 1635, 74th Cong., 1st Sess., Part I, 78-80 (1935) (testimony of ICC Commissioner Eastman, whose proposed legislation was largely adopted as the MCA).

The MCA significantly affected owner-operators' lease agreements with carriers by setting leasing standards. *See Am. Trucking Ass'ns, Inc. v. U.S.*, 344 U.S. at 309 n.10 (upholding the Interstate Commerce Commission's regulations of owner-operator leases by explaining that "[t]he Act as originally drafted included regulation of all carriers engaged in

transportation 'whether directly or by a lease,'" and citing MCA § 203(a)(14)-(15).[11] Importantly, the MCA also created what *Circuit City* calls a "statutory dispute resolution scheme[]," 532 U.S. at 121, for regulatory violations.[12] *See* MCA § 218(c); 1 Fed. Reg. 619, 620 *et seq.* (June 20, 1936), https://www.loc.gov/item/fr001071/.

The Act's dispute resolution process authorized the ICC to conduct administrative review proceedings on its own initiative or upon "complaint of interested parties" to resolve disputes arising from the Commission's determinations as well as those between affected parties. MCA § 218(c); *see also* 1 Fed. Reg. at 620-44 (containing detailed rules of practice and procedure for resolution of complaints brought before the ICC, applicable not only to the MCA but also for disputes arising from transportation by water and rail service providers). Early on, these proceedings often involved challenges to the Commission's entry control determinations that turned on the permissible scope of the agreements between owner-operator drivers and

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[11] Congress amended this language in 1940 for clarity, but without any change in the legislative intent. *See Thomson v. United States*, 321 U.S. 19, 23-24 (1944) (citing 86 Cong. Rec. 11546 (1940)).

[12] Section 203(b) of the MCA provided a number of exemptions from its economic controls, including certain types of intrastate trucking, terminal area operations, private carriage, newspapers, farm-owned equipment, and for-hire trucking of agricultural products, but not for matters affecting safety.

motor carriers.[13] Over time even more comprehensive regulation developed affecting independent truck drivers' leases with motor carriers. *See* Ex Parte No. MC-43, 13 Fed. Reg. 359, 369-372 (Jan. 27, 1948) (requiring that carriers' leases with owner-operators be reduced to writing, disclose the compensation to be paid, and set the minimum duration for leases). The enhanced rules also vested the carrier with control over equipment operations—notwithstanding the truck driver's actual ownership—by requiring the carrier to inspect non-owned equipment, create records on its use, and test the driver's familiarity with safety regulations. *Am. Trucking Ass'ns*, 344 U.S. at 308.[14]

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[13] *See* Comment, *Truck Leasing under the Motor Carrier Act: The Owner-Operator and the ICC*, 30 U. Chi. L. Rev. 358, 361-62 (1963). In such cases, whether parties were subject to ICC authority was based on whether the owner-operator merely leased equipment or provided both the vehicle and his driving services. *See, e.g., Consol. Trucking, Inc.*, 41 M.C.C. 737, 738-39 (1943); *Columbia Terminals Co.*, 18 M.C.C. 662, 665-66 (1939). When independent truckers were under a motor carrier's direction and control, their operations fell within the ICC's regulatory authority. Douglas C. Grawe, *Have Truck, Will Drive: The Trucking Industry and the Use of Independent Owner-Operators Over Time*, Vol. 35:2 Transp. L. J. 116, 120 (Sept. 2008).

[14] In a further effort to protect owner-operators from motor carriers' well-known exploitative leasing practices, the ICC promulgated additional Truth-in-Leasing regulations in 1979, enforced through an administrative dispute resolution program initiated with a trucker's petition. *See Owner–Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co.*, 632 F.3d 1111, 1113 (9th Cir. 2011). Later, as part of the deregulation of the trucking industry, Congress chose to provide truckers with a

From its inception, the MCA's driver safety rules applied to employees and owner-operators alike. MCA §§ 204(a) and 206; 1 Fed. Reg. 735, 739 (July 8, 1936). The Act's limits on maximum hours of service for independent truck drivers and employees resemble how other transportation workers are regulated, including railroad employees, seamen, and air pilots. *See United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 545 & n.28 (1940) (citing the Hours of Service Act of 1907, Pub. L. 59-274, 34 Stat. 1415, 49 U.S.C. §§ 21101-21108 (formerly 45 U.S.C. §§ 61-64 (repealed)) (restricting hours of service for employees engaged in movement of trains); the Seamen's Act of 1915, Pub. L. 63-302, 38 Stat. 1164, 1169, 1170-1184 (prescribing maximum hours of service for sailors, firemen, oilers and others); and the Civil Aeronautics Act of 1938, § 601(a)(5), Pub. L. 75-706, 52 Stat. 973, 1007 (repealed), granting authority to regulate employees "in the interest of safety").

Some years later, Congress imposed "statutory employment status" on carriers, notwithstanding the parties' characterization of their relationship to the contrary. Specifically, in response to motor carriers' widespread practice of designating drivers as "independent contractors" to avoid liability for the negligence of drivers they hired, Congress amended the MCA to make motor carriers responsible for their independent drivers' negligent operation "as if" the carriers were the owners of such vehicles. 49 U.S.C. § 14102(a)(4) (formerly 49 U.S.C. § 11107(a)(4) (1982) and 49 U.S.C. § 304(e) (1956)). As a result, all

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private right of action to address such violations in court. 49 U.S.C. § 14704(a).

drivers engaged by a motor carrier became the carrier's statutory employees to the extent necessary to ensure the carrier's responsibility for public safety. *See White v. Excalibur Ins. Co.*, 599 F.2d 50, 52-53 (5th Cir. 1979).

In sum, by passing the Motor Carrier Act, Congress recognized that independent truck drivers were a vital part of the trucking industry and that their relationships with motor carriers needed to be regulated. The Act controlled the relationships between independent owner-operators and authorized motor carriers by imposing leasing standards and by making carriers responsible for overseeing drivers' safe operations. And similar to legislation Congress adopted for the waterways, railroad, and air industries, an adjudicatory process applicable to independent owner-operators was put in place to resolve disputes arising under the MCA. Thus, the Congress of 1935 enacted the provisions it had evidently anticipated when it passed the FAA in 1925: legislation regulating the emerging trucking industry applicable to all workers and not just "employees," because such limited legislation would have been particularly ineffective given the structure of the trucking business.

In other words, the "class of workers" later to be covered by the MCA's dispute resolution process was "excluded" from the FAA under Section 1 "for the simple reason that [Congress] did not wish to unsettle established *or developing* statutory dispute resolution schemes covering specific workers" at or near the time of the FAA's enactment. 532 U.S. at 121 (emphasis added). That exempted "class of

workers" included, and continues to include today, interstate independent truckers who contracted with trucking firms to provide their services.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 17-340

IN THE

Supreme Court of the United States

NEW PRIME INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") seeks to present its views, and the views of its supporters, on the issue whether § 1 of the Federal Arbitration Act, which exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, applies only to contracts that establish an employer-employee relationship, or whether that exemption also applies to independent contractor agreements.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for a party authored its amicus brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Rule 37.3(a), amicus states that counsel of record for each party has consented to the filing of this amicus brief.

Amicus is committed to a reasonable interpretation of statutes affecting businesses. This means that undefined statutory terms should be construed consistently with their immediate context, not in isolation from that context. This also means that statutory terms should be interpreted consistently with the statute's overarching purpose--here, the Federal Arbitration Act's purpose to enforce arbitration agreements according to their terms. This purpose, coupled with traditional rules of statutory construction, mandates a narrow interpretation of the exemption contained within § 1 of the FAA.

In addition to this amicus brief, NELF has consistently filed amicus briefs in this Court, arguing for the interpretation of federal statutes according to their terms.[2] NELF has also filed numerous amicus briefs in cases in this Court arising under the FAA.[3]

For these and other reasons discussed below, NELF believes that its brief will assist the Court in deciding the issue presented in this case.

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[2] *See, e.g., Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018); *Kellogg Brown & Root Servs., Inc. v. U.S., ex rel. Carter*, 135 S. Ct. 1970 (2015); *Lawson v. FMR LLC*, 571 U.S. 429 (2014); *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49 (2013); *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013).

[3] *See DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

SUMMARY OF ARGUMENT

The phrase "contracts of employment" should be interpreted in its immediate context, under the rule of *noscitur a sociis* ("it is known from its associates"). The phrase modifies "seamen" and "railroad employees," two prominent classes of transportation employees. This indicates that "contracts of employment" must establish an employer-employee relationship.

This meaning is confirmed by applying the related rule of *ejusdem generis* ("of the same kind"), to the residual phrase "any other class of workers," which immediately follows seamen and railroad employees in the exemption. In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), the Court applied *ejusdem generis* to narrow the meaning of that residual phrase to other transportation workers only, because the phrase followed specific examples of transportation workers. Here, application of *ejusdem generis* takes the analysis one step further, by limiting the catch-all phrase "any other class of workers" to other transportation workers who are employees, because seamen and railway employees are specific examples of transportation workers who are employees.

These rules of statutory construction serve the overarching purpose of the FAA. The exemption is embedded in a statute whose purpose is to ensure the judicial enforcement of arbitration agreements according to their terms. This broad statutory purpose counsels in favor of enforcing, not exempting, arbitration agreements under the FAA.

The FAA's exemption for the employment contracts of seamen and railroad employees was apparently intended to leave undisturbed those employees' statutory right, under the Jones Act and the Federal Employers' Liability Act (FELA), respectively, to sue their employer in court for work-related injuries. The FELA and the Jones Act granted those transportation employees a liberalized tort remedy, due to their particularly hazardous working conditions and the inadequacy of state tort law to compensate them for their injuries. Since independent contractors are not covered by the FELA or the Jones Act, Congress would have had no reason to exempt them from the FAA's scope.

ARGUMENT

I. THE FEDERAL ARBITRATION ACT'S EXEMPTION FOR "CONTRACTS OF EMPLOYMENT" REFERS ONLY TO CONTRACTS THAT ESTABLISH AN EMPLOYER-EMPLOYEE RELATIONSHIP.

At issue is the meaning of the exemption, contained within § 1 of the Federal Arbitration Act (FAA), for "*contracts of employment* of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (emphasis added).[4] Does the phrase

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[4] While this case presents other issues pertaining to the FAA's exemption, NELF addresses solely the interpretation of "contracts of employment," as that phrase is used in the FAA's exemption.

"contracts of employment" refer only to contracts that establish an employer-employee relationship, or does that phrase also include independent contractor agreements? NELF argues that, based on the immediate context of the phrase, the FAA's purpose, and a plausible historical explanation for the exemption, "contracts of employment" must define an employer-employee relationship.

A. When Interpreted Properly, In Its Immediate Context, "Contracts Of Employment" Modifies "Seamen" and "Railway Employees," Which Are Two Prominent Classes Of Transportation Employees, Not Independent Contractors.

The phrase "contracts of employment" should be interpreted in its immediate context. "We must, of course, construe the . . . language in the FAA [exemption] with reference to the statutory context in which it is found . . . ." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001) (interpreting "any other class of workers engaged in . . . commerce," appearing in same FAA exemption). A proper consideration of the neighboring words "seamen [and] railroad employees," two prominent classes of transportation employees, indicates that "contracts of employment" refers only to contracts that establish an employer-employee relationship. Independent contractor agreements, such as the one at issue here, are therefore not exempt from the FAA's mandate to enforce arbitration agreements according to their terms.

Indeed, "we rely on the principle of *noscitur a sociis*--a word is known by the company it keeps--to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving *unintended breadth* to the Acts of Congress." *Yates v. United States*, 553 U.S. 285, 294 (2015) (citation and internal quotation marks omitted). According to "th[is] commonsense canon of *noscitur a sociis*[,] . . . a word is given more precise content by the *neighboring words* with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008) (emphasis added). Accordingly, statutory terms that "are susceptible of multiple and wide-ranging meanings," *id.*, should be limited to a meaning that is consistent with their neighboring terms, to form a unified list of terms serving a common purpose. *See id.* After all, no statutory term is an island, contrary to the First Circuit's approach in this case. "[I]t does not stand alone, but gathers meaning from the words around it." *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961).

When viewed in its immediate context, the exemption applies to "contracts of employment of seamen [and] railway *employees* . . . ." 9 U.S.C. § 1 (emphasis added). Both of these classes of transportation workers are employees. The one ("railroad employees") is expressly identified as such by the FAA, while the other ("seamen") is defined by long-established common law tradition. *See Chandris, Inc. v. Latsis*, 515 U.S. 347, 359 (1995) (undefined statutory term "seaman," appearing in Jones Act, means "sea-based

maritime employee[]," based on general maritime law).

Since these named classes of transportation workers are employees, they can only enter into "contracts of employment" that create an employer-employee relationship. Therefore, a contract of employment, as defined by "the company it keeps" in § 1 of the FAA, is a contract that establishes an employer-employee relationship between the transportation worker and the hiring entity. Accordingly, independent contractor agreements fall outside the exemption and are subject to the FAA's mandate.

This limited meaning of "contracts of employment" is confirmed by application of the related rule of statutory construction, *ejusdem generis* ("of the same kind") to the residual phrase "any other class of workers," which immediately follows seamen and railway employees in the exemption. *See Circuit City*, 532 U.S. at 114-15 ("The wording of § 1 [of the FAA] calls for the application of the maxim *ejusdem generis*, the statutory canon that where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.") (citation and internal quotation marks omitted).

In *Circuit City*, the Court applied the rule of *ejusdem generis* to narrow the meaning of "any other class of workers" to other transportation workers only, because that residual phrase

followed specific examples of transportation workers. *See id.*, 532 U.S. at 115 ("Under this rule of construction the residual clause should be read to give effect to the terms 'seamen' and 'railroad employees,' and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it[.]").

Here, application of *ejusdem generis* takes the analysis one step further, by limiting the catch-all phrase to other transportation workers who are employees. Since seamen and railway employees are both classes of transportation employees, it follows that the residual phrase "any other class of workers" should refer only to other transportation workers who are also employees, not independent contractors.

B. The FAA's Overarching Purpose Counsels In Favor Of Enforcing, Not Exempting, Arbitration Agreements Under The FAA.

These well-established rules of statutory construction not only make sense of the phrase "contracts of employment" in its immediate statutory context. They also serve the overarching purpose of the FAA, "a statute that seeks broadly to overcome judicial hostility to arbitration agreements . . . . [There is] no reason to abandon the precise reading of a provision that *exempts* contracts from the FAA's coverage." *Circuit City*, 532 U.S. at 118-19 (emphasis added) (citation and internal quotation marks omitted).

That is, the exemption is embedded in a statute whose "principal purpose . . . is to ensure that private arbitration agreements are enforced according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (citation and internal punctuation marks omitted). This broad statutory purpose counsels in favor of enforcing, not exempting, arbitration agreements under the FAA. *Cf. Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) (when interpreting parties' arbitration agreement under state contract law, "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.").

If allowed to stand, the First Circuit's decision would exempt the entire interstate transportation workforce from the FAA's scope. This would mean that interstate carriers could never invoke the FAA to enforce their arbitration agreements with any of their workers. Such an overbroad interpretation of "contracts of employment" would therefore defeat the FAA's purpose with respect to an entire sector of the nation's economy. It is unlikely that Congress could have intended such a result. "[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

C. The FAA's Exemption For The Employment Contracts Of Seamen And Railroad Employees Indicates Congress's Intent To Leave Undisturbed Those Employees' Statutory Right, Under The Jones Act And The Federal Employers' Liability Act, To Sue Their Employer In Court For Work-Related Injuries.

As the Court has noted, the legislative history underlying the FAA's exemption is "quite sparse." *Circuit City*, 532 U.S. at 119. And while "[i]t is . . . not our job to find reasons for what Congress has plainly done," *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 217 (2002), NELF nonetheless offers an explanation for why Congress would have exempted the employment contracts of seamen and railroad employees--two classes of transportation employees who are exposed to particularly dangerous working conditions--from the FAA's scope.

In *Circuit City*, the Court observed that, at the time of the FAA's enactment, in 1925, there were other federal statutes that provided seamen and railroad employees with alternative dispute resolution mechanisms for employment-related issues, and that Congress would not have wanted to displace those other statutes with the FAA. *See Circuit City*, 532 U.S. at 121. But those other dispute resolution statutes applied only to employees, as both the petitioner and amicus Chamber of Commerce have argued in their

respective briefs.[5] Accordingly, Congress would not have had any reason to exempt independent contractor agreements from the FAA, because independent contractors were not covered by those other statutes.

In the same vein, NELF believes that when Congress exempted the employment contracts of seamen and railroad employees from the FAA's scope, it also sought to leave undisturbed those employees' statutory right, under the Jones Act, 46 U.S.C. § 30101 *et seq.*, and the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* (FELA), respectively, to sue their employer in court for work-related injuries.[6] The FELA, enacted in 1908, applies to railroad "employees," 45 U.S.C. § 51, and the Jones Act, enacted in 1920, applies to

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[5] *See* Brief For Petitioner, at 25; Brief Of The Chamber Of Commerce Of The United States Of America As Amicus Curiae In Support Of Petitioner (on certiorari), at 6-7.

[6] *See* 45 U.S.C. § 51 ("Every common carrier by railroad . . . shall be liable in damages to any person suffering injury [or death] while he is employed by such carrier . . . , or, in case of the death of such employee, to his or her personal representative . . . ."); 46 U.S.C. § 30104 ("A seaman injured [or killed] in the course of employment . . . may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section."). *See also BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1553 (2017) (FELA "makes railroads liable in money damages to their employees for on-the-job injuries."); *Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 427 (2009) ("Enacted in 1920, the Jones Act . . . makes applicable to seamen the substantive recovery provisions of the . . . FELA, . . . which became law in 1908.").

"seamen," 46 U.S.C. § 30104, who are "sea-based maritime employees." *Chandris*, 515 U.S. at 359.

The FELA and the Jones Act granted railroad employees and seamen a liberalized tort remedy against their employers, in state or federal court,[7] due to those employees' particularly dangerous working conditions, and due to the inadequacy of state tort law to compensate them for their injuries:

> FELA was prompted by concerns about the welfare of railroad workers. Cognizant of the *physical dangers of railroading* that resulted in the death or maiming of thousands of workers every year, and *dissatisfied with the tort remedies available under state common law*, Congress crafted a federal remedy that shifted part of the human overhead of doing business from *employees* to their *employers*.

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[7] *See* 45 U.S.C. § 56 ("The jurisdiction of the courts of the United States under this chapter [the FELA] shall be concurrent with that of the courts of the several States."); 46 U.S.C. § 30104 (incorporating FELA remedies in Jones Act). *See also Am. Dredging Co. v. Miller*, 510 U.S. 443, 445 (1994) ("[T]he Jones Act . . . authorizes a seaman who suffers personal injury 'in the course of his employment' to bring 'an action for damages at law,' . . . over which state and federal courts have concurrent jurisdiction.").

Norfolk S. Ry. Co. v. Sorrell, 549 U.S. 158, 179 (2007) (emphasis added) (citation and internal quotation marks omitted); *Chandris*, 515 U.S. at 370 ("The Jones Act remedy is reserved for sea-based maritime *employees* whose work regularly exposes them to *the special hazards and disadvantages* to which they who go down to sea in ships are subjected.") (emphasis added) (citation and internal quotation marks omitted).

To achieve their remedial purpose, the FELA and the Jones Act abrogated employers' common law defenses to liability, such as the fellow-servant rule and assumption of the risk, which had made recovery extremely difficult for employees under state tort law.[8] "A primary purpose of the [FELA, and by incorporation, the Jones Act,] was to eliminate a number of traditional defenses to tort liability and to facilitate recovery in meritorious

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[8] *See* 45 U.S.C. § 51 (FELA eliminates fellow-servant rule by imposing liability on railroad common carrier for employee's work-related injury or death "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."); 45 U.S.C. § 53 (FELA eliminates defense of contributory negligence in favor of comparative fault); 45 U.S.C. § 54 (FELA eliminates assumption of risk); 45 U.S.C. § 55 ("Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void[.]"); 46 U.S.C. § 30104 (Jones Act applies FELA remedies to seamen). *See also Chesapeake & Ohio Ry. Co. v. De Alley*, 241 U.S. 310, 313 (1916) (FELA abrogated fellow servant rule).

cases." *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 561 (1987). *See also Lauritzen v. Chesapeake Bay Bridge & Tunnel Dist.*, 259 F. Supp. 633, 638 (E.D. Va. 1966) ("In essence, [the FELA and the Jones Act] substituted a new statutory remedy for an overly restricted common-law remedy.").[9]

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[9] In effect, the FELA and the Jones Act were negligence statutes that presaged the no-fault workers' compensation statutes that were taking hold at the state level at the time of the FAA's enactment, and then later at the federal level, to compensate employees for work-related injuries. *See* Price V. Fishback and Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States 1900-1930*, National Bureau of Economic Research, NBER Working Paper No. 5840, Nov. 1996 (available at http://www.nber.org/papers/w5840, at 49 (Table 3, "Years in Which States First Adopted a Workers' Compensation Law") (last visited May 21, 2018). *See also Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 193–94 (1983) (discussing Federal Employees' Compensation Act, 5 U.S.C. § 8116(c), as adopting "the [same] 'quid pro quo' . . . commonly found in workers' compensation legislation: employees are guaranteed the right to receive immediate, fixed benefits, regardless of fault and without need for litigation, but in return they lose the right to sue the [employer]," and noting that "[t]his compromise is essentially the same as that found . . . in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a).").

As with the FAA's exemption, contemporaneous state workers' compensation statutes also required a "contract of employment"--i.e., a contract establishing an employer-employee relationship--and they were also limited to employees who were engaged in certain hazardous occupations. *See Madera Sugar Pine Co. v. Indus. Accidental Comm'n of State of California*, 262 U.S. 499, 501–02 (1923) ("This Court has in several cases sustained the constitutionality of workmen's compensation acts . . . establishing exclusive systems governing the liabilities of

It appears likely, then, that the FAA exempted the employment contracts of seamen and railroad employees in order to leave undisturbed those employees' statutory right, under the Jones Act and the FELA, to sue their employer in court for negligence, free and clear of the employer's traditional affirmative defenses. "It is reasonable to assume that Congress excluded 'seamen' and 'railroad employees' from the FAA for the simple reason that it did not wish to unsettle established or developing statutory schemes covering specific workers." *Circuit City*, 532 U.S. at 121.[10] Since

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employers in *hazardous occupations* in respect to compensation for industrial accidents to employees resulting in disability or death . . . .") (emphasis added); *Anderson v. State Indus. Acc. Comm'n*, 215 P. 582, 585 (Or. 1923) ("To be a workman within the meaning of the statute there must be an employer, and this employer must contract for and secure the right to direct and control the services of the workman, while the workman himself must engage to furnish his services subject to the direction or control of the employer. *To create this relation there must be a contract of employment*, either express or implied . . . .") (emphasis added); *Kackel v. Serviss*, 167 N.Y.S. 348, 350 (App. Div. 1917) ("The [New York] Workmen's Compensation Law does not cover all *contracts of employment*; it attempts to provide only for the *hazardous occupations* enumerated in the law . . . . The existence of the fact of a contract [of employment] is essential to the operation of the Workmen's Compensation Law; without such a contract the statute has no operation whatever . . . . The question here is, not whether there is evidence to show that [the worker] was an *independent contractor*, but whether [the hiring entity] entered into a *contract for [his] employment* . . . .") (emphasis added).

[10] For instance, Congress could have been concerned that, since the FAA does not permit judicial review for errors of law, seamen and railroad employees with meritorious claims under the Jones Act and the FELA could be denied recovery

independent contractors are not covered by the FELA or the Jones Act, Congress would have had no reason to exempt them from the scope of the FAA.[11]

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in arbitration when they may have prevailed in court. *See* 9 U.S.C. § 10(a) (enumerating exclusive, non-substantive bases for federal judicial review of arbitral awards).

[11] Independent contractors are excluded from these statutes because their agreements, by their own terms, define a relationship in which the hiring entity does not have the right to control the contractor's work or workplace. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) ("In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished.").

Therefore, the hiring entity, unlike the employer, is generally not liable for the independent contractor's work-related injuries. *See, e.g., Farabaugh v. Pennsylvania Tpk. Comm'n*, 911 A.2d 1264, 1273 (Pa. 2006) ("[G]enerally, landowners employing independent contractors are exempt from liability for injuries to an independent contractor's employees absent an exercise of control over the means and methods of the contractor's work . . . ."); *PSI Energy, Inc. v. Roberts*, 829 N.E.2d 943, 957 (Ind. 2005), *abrogated on other grounds by Helms v. Carmel High Sch. Vocational Bldg. Trades Corp.*, 854 N.E.2d 345 (Ind. 2006) ("As a general rule, a property owner has no duty to furnish the employees of an independent contractor a safe place to work, at least as that duty is imposed on employers."); *O'Connor v. Diamond State Tel. Co.*, 503 A.2d 661, 663 (Del. Super. Ct. 1985) ("The applicable law is that neither an owner nor general contractor has a duty to protect an independent contractor's employee from hazards created by the doing of the contract work or the condition of the premises or the manner in which the work is performed[,] unless the owner or general contractor retains active control over the manner in which the work is carried out and the methods used."); Restatement (Second) of Torts §§ 343-343A (discussing limited bases for holding property

In sum, independent contractor agreements fall outside the area of concern that Congress was addressing when it exempted the employment contracts of seamen and railroad employees from the FAA, thereby leaving undisturbed those employees' judicial remedies under the Jones Act and the FELA. Congress simply had no reason to exempt independent contractor agreements from the FAA's mandate to enforce arbitration agreements according to their terms.

CONCLUSION

For the reasons stated above, the judgment of the First Circuit Court of Appeals should be reversed.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION

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owner liable for invitee's injuries, under premises liability law).

No. 17-340

In The
Supreme Court of the United States

NEW PRIME, INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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IDENTITY AND INTEREST OF *AMICUS CURIAE* OOIDA[1]

The Owner-Operator Independent Drivers Association, Inc. ("OOIDA") is a not-for-profit corporation incorporated in 1973 under the laws of the State of Missouri, with its principal place of business in Grain Valley, Missouri. OOIDA is the largest international trade association representing the interests of independent owner-operators, small-business motor carriers, and professional drivers. More than 160,000 members of OOIDA are professional drivers and small businessmen and women located in all 50 states and Canada.

"Owner-operator" is the term for an individual who owns a commercial motor vehicle ("CMV") and leases that CMV and his or her driving services to a motor carrier under rules authorized under 49 U.S.C. § 14102 and promulgated at 49 C.F.R. Part 376 (the "Truth-in-Leasing" rules). Motor carriers, such as New Prime, Inc., are companies who are authorized and registered by the federal government to operate commercial motor vehicles in interstate commerce. 49 U.S.C. § 13902.

The question of whether or not the contracts of owner-operators are subject to the Federal Arbitration

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[1] No party's counsel authored this brief in whole or in part. No party, party's counsel, or person – other than the *amicus curiae* – contributed money intended to fund the preparing or submitting of this brief. Counsel for both parties have consented to the filing of this brief.

Act ("FAA") will determine whether or not owner-operators will continue to have any meaningful opportunity to protect their small businesses from the type of predatory behavior described in Mr. Oliveira's brief. Congress and federal motor carrier regulators' concern for these issues are the reasons the Truth-in-Leasing rules were promulgated. Especially important is the right to bring an action in federal court for damages and injunctive relief specifically granted to owner-operators by Congress in 1995. 49 U.S.C. §§ 14102, 14704.

SUMMARY OF THE ARGUMENT

OOIDA submits this brief as *amicus curiae* to inform the court how owner-operator truck drivers are a class of workers engaged in interstate commerce, and how their lease agreements with motor carriers, such as New Prime, Inc., are contracts of employment, as set out in the FAA exemption found at 9 U.S.C. § 1. Congress looked to two factors when it formed the scope of Section 1 of the FAA: the maintenance of a smooth operating transportation system and Congressional concerns for enacting specific regulations governing the contracts of transportation workers. In the 1950s Congress authorized the Interstate Commerce Commission ("ICC") to promulgate rules requiring motor carriers, such as New Prime, Inc., to assume responsibility and control over the operations of their owner-operators. Motor carriers are also required to obtain public liability insurance for their owner-operator operations, as if their owner-operators were the carriers'

own trucks and employee drivers. Later, the ICC promulgated additional rules under this regulatory scheme to protect owner-operators from being exploited by motor carriers. The newer rules established standards for the contracts presented by motor carriers to owner-operators and for the conduct of motor carriers under those contracts. These statutes and rules support the economic stability and safety performance of the participants in the motor carrier industry and, therefore, promote the smooth flow of goods in interstate commerce.

Also, consistent with Congress' intention to exclude contracts of employment of workers engaged in interstate commerce from the FAA, Congress specifically provided for the means of resolving owner-operator/motor carrier disputes by statute. Originally, the ICC was charged with adjudication of such disputes. Once the ICC was terminated in 1995, Congress granted owner-operators a private right of action in federal courts to adjudicate those rights and seek damages and injunctive relief. *See* 49 U.S.C. § 14704, and *Owner-Operator Indep. Drivers Ass'n, Inc. v. New Prime, Inc.*, 192 F.3d 778, 785 (8th Cir. 1999).

This legislative and regulatory history demonstrates that motor carrier/owner-operator contracts are among the contracts Congress exempted in Section 1 of the FAA.

But even if the Court believes that the FAA exemption may not have originally contemplated contracts such as those between motor carriers and owner-operators, Congress' grant of a private right of action in federal court was a de facto expansion of the FAA exemption, providing owner-operators the right to go to court to resolve disputes with motor carriers.

ARGUMENT

CONGRESS HAS REGULATED THE CONTRACTUAL RELATIONSHIPS OF MOTOR CARRIERS AND OWNER-OPERATORS SINCE THE 1950S

Congress relied upon two factors to form the scope of Section 1 of the FAA: the maintenance of a smooth operating transportation system and Congressional concerns for enacting specific regulations governing the contracts of transportation workers (as detailed in Respondent's brief). In holding that the FAA exemption applies to "transportation workers," the Court has held that it was "rational for Congress to ensure that workers in general would be covered by the provisions of the FAA, while reserving for itself more specific legislation for those engaged in transportation." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

For motor carrier transportation, Congress and several federal regulatory agencies acted upon those concerns by establishing requirements for leasing agreements (the contracts) between motor carriers and owner-operators and by providing administrative and

then statutory schemes for resolving disputes that arise under those leasing agreements.

A. Congress and The ICC First Mandated Motor Carrier Control of and Responsibility for Owner-Operators

The federal government's oversight of owner-operator/motor carrier contracts began when Congress required motor carriers operating with federal authority to assume responsibility for the safe operation of owner-operators with whom they contract. Congress responded to agency and congressional findings that motor carriers had attempted to immunize themselves from the negligence of the drivers who operated their own vehicles by making them all nominally "independent contractors." *See* Amendments to the Interstate Commerce Act, Pub. L. No. 84-957; H.R. Rep. No. 84-2425, reprinted in 1956 U.S.C.C.A.N. 4304, 4309; *see also White v. Excalibur Ins. Co.*, 599 F.2d 50, 52 (5th Cir. 1979) (citing *Transamerican Freight Lines, Inc. v. Brada Miller Freight Sys., Inc.*, 423 U.S. 28 (1975)); *Am. Trucking Ass'ns, Inc. v. United States*, 344 U.S. 298, (1953); *Alford v. Major*, 470 F.2d 132 (7th Cir. 1972). Because the financial condition of owner-operators was such that injured members of the public were not able to recover in legal actions against them, Congress assigned public liability and the responsibility for insurance to motor carriers. Amendments to the Interstate Commerce Act, Pub. L. No. 84-957; H.R. Rep. No. 84-2425, reprinted in 1956 U.S.C.C.A.N. 4304, 4309.

Congress imposed those requirements upon motor carriers by authorizing the ICC to promulgate "regulations as may be reasonably necessary to assure that motor carriers will have full direction and control of vehicles while they are being used under such leases, and will be fully responsible for the operation thereof in accordance with applicable law and regulation, as if they were the owners of the vehicles," including compliance with all safety rules. *Id.*

The ICC thereafter promulgated rules which stated, in part: "The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease." 49 C.F.R. § 376.12(c)(1).

Congress' mandate over motor carrier/owner-operator leasing agreements illustrates how it considered and treated such agreements as falling within the FAA exemption. This statute and the rules directing motor carriers to assume responsibility and control over owner-operators in their lease agreements were intended to promote a safer and more stable motor carrier industry, thereby ensuring the smoother flow of goods.

B. The Expansion of The Leasing Rules to Address Motor Carrier Exploitation of Owner-Operators

The leasing rules were amended significantly by the ICC in 1979 and have existed without material change since then. Lease and Interchange of Vehicles, 131 M.C.C. 141 (January 9, 1979); 49 C.F.R. Part 376.[2] In promulgating these regulations, the ICC responded to a well-documented and longstanding history of abuses by motor carriers of owner-operators in their lease/contract relationship. *Global Van Lines v. Interstate Commerce Comm'n*, 627 F.2d 546, 548 (D.C. Cir. 1980). These amendments, which have become known as the "Truth-in-Leasing Rules," were intended to achieve "full disclosure of the benefits and obligations of leasing arrangements between owner-operators and regulated carriers." Lease and Interchange of Vehicles, 129 M.C.C. 700, 702 (June 13, 1978). Specific provisions are required to be included in the written lease, such as specifying owner-operator compensation, prohibiting motor carriers from forcing owner-operators to purchase goods and services from the carrier as a condition for entering the lease, and disclosing the type and amount of any charge-backs the motor carrier may deduct from an owner-operator's compensation during the term of the lease. *See* 49 C.F.R. § 376.12. To impart the importance of these rules to motor carriers, the

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[2] In 1996, the regulations were redesignated from 49 C.F.R. Part 1057 to Part 376 without substantive change. *See* 61 Fed. Reg. 54706, 54707 (October 21, 1996).

ICC required that those provisions "shall be adhered to and performed by the authorized carrier." *Id.*

Particularly pertinent to the FAA transportation exemption, the ICC's stated purposes for these regulations were:

> (1) to simplify existing and new regulations and to write them in understandable English; (2) to promote truth-in-leasing – a full disclosure between the carrier and the owner-operator of the elements, obligations, and benefits of leasing contracts signed by both parties; (3) to eliminate or reduce opportunities for skimming and other illegal or inequitable practices; and (4) ***to promote the stability and economic welfare of the independent trucker segment of the motor carrier industry***.

Lease & Interchange of Vehicles, 131 M.C.C. 141 (January 9, 1979) (emphasis added).

When commenting on the proposed rules, ICC Chairman O'Neal observed:

> My concern is that because they like to eat, owner-operators will continue to find it necessary to enter into contracts with carriers they would like to avoid. . . . The difficulty is that one owner-operator by himself will have very little chance of bargaining any changes in any contract. His option will be take it or leave it.

Lease and Interchange of Vehicles, 43 Fed. Reg. 29812, 29813 (July 11, 1978).

The regulation of the contractual relationship between motor carriers and owner-operators underscores Congress' concern about this particular group of interstate transportation workers and their necessary role in the free flow of goods. *See* Lease and Interchange of Vehicles, 131 M.C.C. 141, 143-44 (January 9, 1979); *Global Van Lines v. Interstate Commerce Comm'n*, 627 F. 2d 546, 550-51 (D.C. Cir. 1980).

These rules protect owner-operators and benefit the public: "Since only the carrier has ICC authority, it is not permitted to delegate it, abrogate it, or evade the responsibilities imposed on it by means of a contractual device, for there are basic requirements that are inherent in the relationship of the carrier for hire with operating authority to the public. . . . [T]hus, responsibility to the public under the leasing device is fixed." *Rediehs Exp., Inc. v. Maple*, 491 N.E.2d 1006, 1011 (Ind. 1986) (citations omitted). As the Seventh Circuit noted in a review of Section 376.12(j)(1), the point of the leasing regulations "is to remove from the domain of private choice the terms on which [those with federal operating authority] may do business." *Westfield Ins. Co. v. Hanover Ins. Co.*, 9 F.3d 656, 657 (7th Cir. 1993). The immutability of the rights of owner-operators and the duties of motor carriers under these rules is precisely the type of public policy choice that Congress intended to remove from private discretion and preserve for itself under the FAA Section 1 exemption. Contracts by regulated carriers employing owner-operators to transport goods in interstate commerce are thus

squarely within the exemption of Section 1 to the FAA applicable to "transportation workers."

That policy is further bolstered by the history of the government's direction of the resolution of owner-operator and motor carrier disputes, which New Prime, Inc. attempts to avoid by requiring its drivers to accept an arbitration clause in its contracts.

C. The Provisions in Federal Law For Motor Carrier/Owner-Operator Dispute Resolution

Consistent with Congress' intent to reserve from the FAA the resolution of owner-operator/motor carrier disputes, federal law has long provided for the resolution of contractual disputes between owner-operators and motor carriers. Originally, the ICC resolved disputes between owner-operators and motor carriers through enforcement proceedings. Then, when, Congress passed the ICC Termination Act ("ICCTA"), Pub. L. No. 104-88, 89 Stat. 26 (December 29, 1995), it granted owner-operators a private right of action in federal court to resolve these disputes. 49 U.S.C. § 14704.

1. Pre-1995 Resolution of Owner-Operator Complaints by the ICC

Prior to the 1995 enactment of the ICCTA, the ICC regulated economic and market rules for motor carriers. The ICC held plenary authority over enforcement of the Truth-in-Leasing regulations, including the authority to seek court enforcement of a motor carrier's

obligation to safeguard, account for, pay interest on, and eventually return escrow funds. The ICC could "begin an investigation [of a violation of the leasing regulations] on its own authority or on a complaint." 49 U.S.C. § 11701(a) (1995). Owner-operators could bring such a complaint under the authority of 49 U.S.C. § 11701(b) (1995). As noted by the ICC:

> Carrier leasing practices are investigated based on patterns of complaints and other information received or developed by the Commission's field staff and through compliance surveys. The Commission takes enforcement action to ensure compliance with the leasing regulations. For example, the Commission seeks injunctions against carriers that fail to make payments to owner-operators.

Interstate Commerce Commission, *Study of Interstate Commerce Commission Regulatory Responsibilities Pursuant to Section 210(a) of the Trucking Industry Regulatory Reform Act of 1994*, 1994 WL 639996, at *53 (October 25, 1994).

The ICC had broad authority to enforce its regulations, including the Truth-in-Leasing regulations, under 49 U.S.C. §§ 11701, *et seq.* (1995). *See S. Pac. Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 349-50 (1982). This authority included the power to issue a cease-and-desist order, *Shaw Warehouse Co. v. S. R. Co.*, 308 I.C.C. 609, 633-634, 637 (1959), to seek a federal court injunction requiring a carrier to comply with its regulations, *Interstate Commerce Comm'n v. All-American, Inc.*, 505 F.2d 1360 (7th Cir. 1974), and to bring suit for civil

forfeiture, 49 U.S.C. §§ 16(8), 11901(a) (1976 ed., Supp. III), for each knowing violation of an order of the Commission. This Court noted that "[t]he Commission's authority under the Interstate Commerce Act [wa]s not bounded by the powers expressly enumerated in the Act." *Interstate Commerce Comm'n v. Am. Trucking Ass'ns, Inc.*, 467 U.S. 354, 365 (1984). Instead, the ICC could fashion any number of remedies so long as they were "legitimate, reasonable, and directly adjunct to the Commission's explicit statutory power." *Id.*; *Interstate Commerce Comm'n v. Transcon Lines*, 513 U.S. 138, 145 (1995). These broad, undefined remedies were authorized out of the recognition that Congress could not be expected to anticipate "every evil sought to be corrected" by the ICC and that "the absence of express remedial authority should not force the Commission to sit idly by and wink at practices that lead to violations of ICA provisions." *Am. Trucking*, 467 U.S. at 371; *see also Zola v. Interstate Commerce Comm'n*, 889 F.2d 508, 516 (3d Cir. 1989) (holding that "[t]he Commission's discretionary remedial powers are not limited to the rate-making area"). OOIDA is unaware of any motor carrier ever invoking the FAA and an arbitration clause in an owner-operator contract to try to deprive the ICC of its dispute resolution jurisdiction.

2. The ICC Termination Act Granted a Specific Private Right of Action in Federal Court

Congress terminated the ICC as a federal agency by passing ICCTA. Congress transferred several areas

of the ICC's authority and functions (including its jurisdiction over the Truth-in-Leasing regulations) to the U.S. Department of Transportation ("DOT"). *See* 49 U.S.C. § 14102. Within the DOT, responsibility over the Truth-in-Leasing regulations now resides with the Federal Motor Carrier Safety Administration. 49 C.F.R. § 1.87(a)(6), (8). The ICCTA provision codified at 49 U.S.C. § 14704(a) expressly authorizes private actions for damages and injunctive relief to remedy violations of that section of the Motor Carrier Act and its implementing regulations. This private right of action was first recognized by the courts in litigation between OOIDA and New Prime, Inc.: *Owner-Operator Indep. Drivers Ass'n, Inc. v. New Prime, Inc.*, 192 F.3d 778, 785 (8th Cir. 1999).

The courts have further recognized that the federal default four-year statute of limitations under 28 U.S.C. § 1658 applies to actions under 49 U.S.C. § 14704. *Owner-Operator Indep. Drivers Ass'n, Inc. v. United Van Lines, LLC*, 556 F.3d 690, 696 (8th Cir. 2009), and under the American Rule, prevailing plaintiff owner-operators, but not prevailing motor carrier defendants, have a right to recover reasonable attorneys fees under 49 U.S.C. § 14704(e). *Owner-Operator Indep. Drivers Ass'n, Inc. v. New Prime, Inc.*, 398 F.3d 1067, 1071 (8th Cir. 2005). In rejecting New Prime, Inc.'s assertion that it was entitled to attorneys fees, the Eighth Circuit observed:

> The right to enforce privately the Truth in Leasing regulations, a right which this court recognized in Prime I, would be severely

> chilled if we were to adopt Prime's interpretation of § 14704(e). Claims of independent owner operators may often be for a relatively small amount of damages. The class action complaint filed in this action, for example, alleged that each prospective class member had deposited approximately $1,000—$20,000 with Prime under the disputed contract terms that established reserve funds and a security deposit. This shows that the potential rewards are already low, and increasing the risks by imposing attorney fees on owner operators who do not prevail would discourage them from pursuing their claims in court. Absent any evidence to the contrary, we do not conclude that Congress established a private remedy and simultaneously created a unique and formidable barrier to its attainment.

Id. Similarly, here, New Prime, Inc.'s effort to apply the FAA to owner-operator contracts would create another formidable barrier, effectively denying owner-operators the private remedy in federal court granted by Congress.

Several federal courts have held that motor carriers lease contracts with owner-operators fall into the FAA exemption: *See Owner-Operator Indep. Drivers Ass'n, Inc. v. C.R. England, Inc.*, 325 F. Supp. 2d 1252, 1257 (D. Utah 2004) ("It is clear that Plaintiffs, as persons who, pursuant to the Operating Agreements at issue, actually move items in interstate commerce, are in a class of workers engaged in interstate commerce, or are transportation workers, within the meaning of

the exemption."); *Owner-Operator Indep. Drivers Ass'n, Inc. v. Landstar Sys., Inc.*, No. 3:02-CV-1005-J-25HTS, 2003 WL 23941713, at *2 (M.D. Fla. September 30, 2003) ("[B]y operation of federal law the individual Plaintiffs and Defendants have an employee-employer relationship."); *Gagnon v. Serv. Trucking Inc.*, 266 F. Supp. 2d 1361, 1364 (M.D. Fla. 2003), *vacated pursuant to settlement*, No. 5:02-CV-342-OC-10GRJ, 2004 WL 290743 (M.D. Fla. February 3, 2004) ("The Court agrees that the Plaintiff – and the other putative class members, all of whom are truck drivers – fall within the definition of 'workers engaged in interstate commerce.'").

The ICC's former expansive authority to resolve complaints of owner-operators against motor carriers and the current private right of action express the purpose of the FAA exemption: to ensure that conflicts related to persons engaged in interstate commerce are resolved in ways that best fulfill public policy interests. If the FAA applied to motor carrier/owner-operator contracts, then motor carriers' imposition of an arbitration requirement would defeat the consistent enforcement of rules created to protect the public's interest in a stable, reliable transportation system. The public would not be protected from an owner-operator who was forced to drive a thousand miles in one week without being paid, damaging that driver's economic stability, health, safety, and ability to operate within federal law and meet all of his economic obligations to his motor carrier, the maintenance of his truck and business, and his family's needs at home.

The FAA exemption applies to whole classes of contracts of employment of persons engaged in interstate or international commerce. The exemption was not written to expand and contract to the extent the federal government chooses to regulate such contracts. Common law distinctions between "employees" and "independent contractors" were not of concern to Congress in drafting the FAA exemption. The Court need not determine whether New Prime, Inc.'s labeling of Mr. Oliveira as an independent contractor was accurate. Both employees and independent contractors, such as owner-operators, fall within the FAA exemption.

Even if the court were to find that owner-operator contracts were not the type of contract contemplated by the FAA exemption, the subsequent Congressional grant of a private right of action to owner-operators for damages and injunctive relief must be harmonized with whatever the FAA exemption may have existed previously. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment. The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (citations omitted), cited with approval by *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984). By requiring an arbitration clause in owner-operator contracts,

motor carriers would defeat the unmistakable public policy choice of Congress in ICCTA to preserve the remedy to seek damages and injunctive relief in court available previously through the ICC. This statute continues Congress' intent to protect drivers from coercive contracts and behavior by motor carriers, and ensures the public benefits from a stable and smooth transportation system.

CONCLUSION

The Congress and federal agencies' historical oversight and regulation of motor carrier/owner-operator contracts, and their provision of different procedures and forums to resolve disputes under those contracts demonstrate precisely the type of contract for employment of persons engaged in interstate commerce that Congress intended to exempt from the FAA. These statutes and rules ensure a stable transportation industry by requiring motor carriers to take responsibility for the safe operation of owner-operators, requiring motor carriers to use and comply with owner-operator contract provisions that remedy the historical ways that motor carriers have exploited owner-operators, and giving owner-operators the right to go to federal court to resolve disputes under those contracts. These requirements ensure that owner-operators are directed by motor carriers to operate safely and that they have the economic predictability and stability to do so. A definitive finding by this Court more than 90 years after the passage of the FAA that motor carrier/owner-operator

contracts are not exempted from the FAA would erect such a burden (similar to the Eighth Circuit's observation quoted above) that it would effectively defeat an owner-operator's ability to enforce his or her rights, and therefore frustrate the public policy choices of Congress and the regulating agencies.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and the courts. Public Citizen works on a wide range of issues, including enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has a longstanding interest in issues concerning the enforcement of mandatory predispute arbitration agreements, and it has appeared as amicus curiae in many cases involving such issues in this Court and other federal and state courts.

Public Citizen submits this brief to address one of the two issues raised by petitioner New Prime in its brief: whether, when a contract contains an arbitration provision including a clause delegating questions of "arbitrability" to an arbitrator, the Federal Arbitration Act (FAA) requires a court to compel arbitration of the issue whether the FAA even applies to the contract. The argument that a court must apply a statute without first determining that the statute applies to the case is so unusual that New Prime's own amici curiae hardly mention its argument on the point, and instead almost exclusively address the merits of the question whether the contract here is a contract of employment of a transportation worker to which the FAA does not apply. Both New Prime's

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of the brief. Counsel for both parties have consented in writing to its filing.

brief and that of respondent Frank Oliveira likewise devote most of their attention to that merits question.

In arbitration cases, however, the question of who decides an issue—court or arbitrator—often plays a critical role. And although New Prime's argument—that the FAA requires a court to refer the issue of its own applicability to an arbitrator without first addressing a substantial argument that the Act does not apply to the contract containing the delegation clause the court is being asked to enforce—seems counterintuitive, a brief addressing it may assist the Court in reaching a decision that adds clarity to arbitration law and helps define the limits of the Court's rulings on the subject.

SUMMARY OF ARGUMENT

New Prime's lead argument in this case is that the FAA requires a court to order arbitration before the court has even found that the FAA applies. But no statute can dictate the outcome of an issue in a case in which the statute does not apply. Justice Scalia expressed the point succinctly: "If a provision of law is 'inapplicable' then it cannot be applied." *Republic of Iraq v. Beaty*, 556 U.S. 848, 864 (2009).

The FAA itself makes plain that it provides no occasion for an exception to this common-sense principle: It states that "nothing" in the FAA "shall apply to contracts of employment of ... workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Thus, the FAA's basic provision that an arbitration provision "in ... a contract evidencing a transaction involving commerce" is "valid, irrevocable, or enforceable," 9 U.S.C. § 2, *does not apply* if the "contract" containing the arbitration provision is a contract of employment of an interstate or foreign commerce worker.

Moreover, this Court has long held that the FAA's procedural provisions requiring courts to stay litigation pending arbitration and to compel parties to arbitrate, 9 U.S.C. §§ 3 & 4, apply only to arbitration agreements made enforceable by section 2. Thus, the FAA does not require a court to compel arbitration under an arbitration provision contained in a contract of employment falling within section 1's exclusion.

Accordingly, before compelling arbitration under the FAA, a court must, if the matter is disputed, determine whether the contract that includes the arbitration provision sought to be enforced is a contract of employment of a worker engaged in interstate or foreign commerce—a phrase that this Court has held refers to workers engaged in interstate or foreign transportation. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). If the contract falls in that category, the FAA has nothing to say about whether an arbitration provision in the contract must be enforced.

In this case, therefore, it is up to the courts, not an arbitrator, to decide whether the contract containing the arbitration agreement New Prime seeks to enforce is a contract of employment of a transportation worker. If, as respondent Oliveira's brief demonstrates, it is such a contract, the FAA does not require enforcement of *any* arbitration provision it contains—including a provision calling for arbitration of whether a dispute is subject to arbitration.

New Prime's contrary assertion rests on its view that the FAA requires that the question of its own applicability be arbitrated under a "delegation" clause in the arbitration provision at issue, which calls for arbitration of disputes about whether a specific matter is subject to arbitration. But as this Court has

held, a delegation clause is only a form of arbitration agreement under the FAA. Thus, the FAA does not apply to the clause if it is within a contract of employment of a transportation worker, any more than the Act applies to any other arbitration agreement contained in such a contract.

New Prime seeks to avoid this conclusion by invoking the principle that arbitration agreements, including delegation clauses, are "severable" from the contracts that contain them. New Prime's reliance on the severability principle is misplaced, however, because that principle is applicable to determinations of the *validity* of arbitration provisions, not of whether they are subject to the FAA. The doctrine provides no basis for overriding the FAA's express language rendering its requirements inapplicable to an arbitration provision contained in a contract of employment of a transportation worker.

ARGUMENT

I. The FAA cannot, and does not, require a court to enforce any arbitration agreement unless the court determines that the FAA applies to that agreement.

At issue in this case is whether the FAA requires arbitration of the dispute between New Prime and respondent Dominic Oliveira over whether New Prime's compensation of its truck drivers violated federal and state minimum wage laws. That issue requires the Court to resolve two subsidiary issues: whether the FAA requires that the courts refer to an arbitrator the question whether the FAA applies to this case; and, if not, whether this case involves a contract of employment of a worker engaged in interstate commerce, rendering the FAA inapplicable.

Because New Prime has rested its arguments on both issues solely on the FAA, the Court's resolution of the "who decides" question, like its resolution of the ultimate question of the FAA's application to the contract at issue in this case, depends on the text of the FAA. Consideration of the question "starts 'where all such inquiries must begin: with the language of the statute itself.'" *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1759 (2018) (quoting *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011)). Here, as is often the case, "the statutory text is enough to resolve" the question. *Pereira v. Sessions*, 138 S. Ct. 2105, 2114 (2018). The language of the FAA unambiguously forecloses the argument that the FAA requires arbitration of any issue—including that of its own application—in any case where the arbitration provision a party seeks to enforce is found in a contract of employment of a transportation worker.

As pertinent here, the FAA expressly makes an agreement to arbitrate a dispute enforceable if it is set forth as "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce." 9 U.S.C. § 2.[2] As this Court has put it, to be enforceable under the FAA, an arbitration agreement "*must* be part of a written maritime contract or a contract 'evidencing a transaction involving commerce.'" *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984) (emphasis added). In other words, by its

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[2] Section 2 also provides for enforceability of an agreement in writing to arbitrate "an existing controversy arising out of" a maritime transaction or contract evidencing a transaction in interstate commerce. Such a post-dispute arbitration agreement is not at issue here.

plain terms, the FAA's enforcement mandate applies only to arbitration provisions "in certain classes of contracts." *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 200 (1956).

Section 1 of the FAA provides an additional limit on the applicability of any requirement under the Act that an arbitration provision be enforced. Section 1 begins by defining the terms "maritime transactions" and "commerce" that are critical to the scope of section 2's enforceability mandate, and goes on to say, "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.

Section 1's provision that nothing in the Act shall apply to the specified "contracts of employment" links directly with section 2's language making arbitration provisions "in" certain "contracts" enforceable. The obvious meaning of section 1 is that section 2's requirement that an arbitration provision in a contract involving commerce be enforced shall not apply to a provision in a contract of employment of a worker engaged in interstate or foreign commerce. Thus, section 2 does not make an arbitration provision enforceable if it is in one of the contracts of employment described in section 1.

Section 1 likewise renders sections 3 and 4 of the FAA, which authorize courts to stay litigation and compel arbitration of disputes subject to arbitration agreements, inapplicable to arbitration provisions in contracts of employment of interstate commerce workers. Invoking these sections of the FAA to require arbitration under a provision in a contract of employment falling within section 1 would "apply"

the FAA to such a contract, contrary to section 1's express command.

Accordingly, this Court has long held that sections 3 and 4 apply only to arbitration agreements that are enforceable under section 2. In *Bernhardt*, this Court recognized that "Sections 1, 2, and 3 are integral parts of a whole. ... [Sections] 1 and 2 define the field in which Congress was legislating. ... [Section] 3 reaches only those contracts covered by [sections] 1 and 2." 350 U.S. at 201–02. And in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), the Court made clear that section 4 similarly provides only a means of enforcing agreements falling within the scope of section 2's enforceability rule. *See id.* at 400–04. Because section 1 takes the contracts of employment to which it applies outside section 2's rule that an arbitration provision in a contract involving commerce is enforceable, it necessarily renders the procedural enforcement mechanisms of sections 3 and 4 inapplicable as well.

This Court's decisions have recognized this straightforward and obvious reading of the statute. In *Southland*, for example, the Court noted that section 1's language making the FAA inapplicable to the specified contracts of employment effectively limited the definition of "commerce" that in turn defines the scope of section 2's enforcement mandate. *See* 465 U.S. at 11, n.5. The Court recognized the point even more explicitly in *Circuit City*, which held that the term "workers engaged in foreign or interstate commerce" applies only to transportation workers. 532 U.S. at 119. Pervading the Court's opinion was recognition that section 1 is an "exclusion provision" providing an "exemption from [the FAA's] coverage,"

532 U.S. at 112, for arbitration agreements contained in the contracts of employment to which it applies. Thus, as the Court put it, "Section 1 *exempts from the FAA* ... contracts of employment of transportation workers." *Id.* at 119 (emphasis added).

It follows that, before applying the FAA to order that an issue be arbitrated, a court must resolve any dispute over whether the FAA applies to the contract containing the arbitration provision at issue. Absent such a determination, the FAA neither requires nor authorizes the court to enforce an arbitration provision. Thus, this Court has consistently recognized that whether the FAA is applicable to a contract is a "threshold" question antecedent to whether a court must order a party to arbitrate under the Act. *Bernhardt*, 350 U.S. at 200; *see, e.g.*, *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273–82 (1995); *Southland*, 465 U.S. at 11; *Prima Paint*, 388 U.S. at 401.

The requirement that a court decide whether the contract at issue is excluded from the FAA's coverage by section 1 before ordering arbitration of any issue (including the section 1 issue itself) is critical, because any order compelling arbitration under the FAA is necessarily applying the FAA to give effect to a purported agreement to arbitrate. A court may not apply the FAA where the FAA itself provides that it is inapplicable. "[T]o 'apply' a statute is '[t]o put [it] to use,'" *Beaty*, 556 U.S. at 864, and invoking the FAA to require arbitration undeniably puts the statute to use—which a court "cannot" do when "a provision of law is 'inapplicable.'" *Id.*

This Court has insisted that when Congress says a law "shall not apply" in specified circumstances, the

courts must take Congress at its word and decline to apply it, because "Congress says what it means and means what it says." *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1847–48 (2016). And interpreting a statute to apply where it says it does not apply is "a reading most unnatural." *Levin v. United States*, 568 U.S. 503, 514 (2013). Holding that the FAA requires a court to enforce an agreement to arbitrate without first determining whether the FAA excludes the case from its application would accept just such an unnatural reading.

II. New Prime's invocation of its delegation clause and the principle of "severability" cannot justify application of the FAA to a contract to which the FAA does not apply.

New Prime's counterintuitive assertion that the FAA can require a court to compel arbitration without first determining that the FAA applies rests on its assertion that its arbitration agreement contains a "delegation" clause requiring arbitration of issues of "arbitrability." In New Prime's view, that clause encompasses even the threshold question whether the FAA applies at all. In arguing that the FAA requires arbitration of its own applicability under the delegation clause, New Prime effectively asserts that a court must apply the FAA to a contract containing a particular type of arbitration provision—a delegation clause—even where the FAA is inapplicable to the contract. New Prime's assertion runs counter to both the text of the statute and this Court's precedent, under which a delegation clause cannot by its mere existence require its own enforcement if the FAA does not apply to the contract containing it.

As this Court held in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), a delegation clause is nothing more than a specialized type of arbitration provision: one that requires arbitration concerning the applicability or validity of the arbitration provision of which it is a part (in the same way that that arbitration provision may in turn require arbitration concerning the applicability or validity of the contract of which it is a part). *Id.* at 68–70. Critically, *Rent-A-Center* explained that "the FAA operates on this additional arbitration agreement just as it does any other," *id.* at 70, so that it is enforceable under the FAA if (and only if) section 2 of the Act requires its enforcement. *See id.*

By its plain language, the way the FAA "operates on" the delegation clause, as it does on any other arbitration provision, is to require its enforcement only if it is a provision "in … a contract evidencing a transaction involving commerce," 9 U.S.C. § 2, and only if the application of section 2 and other parts of the FAA to that contract is not precluded by section 1 because the contract is a contract of employment of a transportation worker. There is no dispute that the delegation clause New Prime seeks to enforce is a provision "in" the contract that Mr. Oliveira contends is a contract of employment of a transportation worker. Thus, whether the FAA requires the court to enforce the delegation clause and order the parties to arbitrate questions of "arbitrability" under it depends on whether the contract in which the clause is found is a contract of employment under section 1's exclusion clause. The FAA cannot require a court to order arbitration under the delegation clause unless the court first makes that determination, on which the applicability of the FAA depends.

New Prime wrongly insists that whether the FAA requires enforcement of its delegation clause must be determined without regard to the nature of the contract in which it is set forth because of the principle of "severability." Under that doctrine, the *validity* of an agreement to arbitrate (including a delegation clause) is treated as a separate question from that of the larger contract of which it is a part. *See Rent-A-Center*, 561 U.S. at 70–71; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444–46 (2006); *Prima Paint*, 388 U.S. at 402–04. Thus, unless its own validity is specifically challenged, an arbitration provision may be enforceable even if the contract of which it is a part is invalid, and a party may therefore be required to arbitrate its challenge to the validity of the contract as a whole. *See Rent-A-Center*, 561 U.S. at 71; *Buckeye*, 546 U.S. at 444–45; *Prima Paint*, 388 U.S. at 404. The Court's treatment of delegation clauses as specialized arbitration provisions severable from the larger arbitration provisions of which they are a part means that a valid delegation clause may require arbitration of the validity of the arbitration provision as a whole. *Rent-A-Center*, 561 U.S. at 71–72.

These principles, however, do not assist New Prime because the severability doctrine has a statutory basis that limits it to challenges to the enforceability and validity of an arbitration clause; it does not encompass disputes over whether the FAA applies at all. As the Court explained in *Rent-A-Center*, the severability doctrine is based on the language of section 2 of the FAA, which makes an arbitration provision that is subject to the FAA "'valid, irrevocable and enforceable' *without mention* of the validity of the contract in which it is contained." 561 U.S. at 70. This language, as the Court has explained, requires sever-

ability specifically of "validity" issues, which are different from other prerequisites to application of the FAA, such as whether a contract containing an arbitration provision was ever formed. *Rent-A-Center*, 561 U.S. at 71, n.2; *Buckeye*, 546 U.S. at 444, n.1. This Court has applied the severability principle only to validity issues.

For example, the Court's decisions teach that the severability doctrine does not apply to the fundamental question whether the parties have entered into a contract containing an arbitration provision. The FAA provides for enforcement of an arbitration provision only if it is in a "contract," 9 U.S.C. § 2, and the existence, though not the validity, of that contract is a prerequisite to any application of the FAA, which is always "a matter of contract between the parties." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). Thus, the Court in both *Rent-A-Center* and *Buckeye* specifically noted that it was not holding that the severability principle applies to the issue whether a contract exists at all. *See Rent-A-Center*, 561 U.S. at 71, n.2; *Buckeye*, 546 U.S. at 444, n.1.

Confirming this limitation on the severability holdings of *Rent-A-Center* and *Buckeye*, the Court held in *Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287 (2010), that a court must "always" decide whether the parties entered into the agreement to arbitrate, *id.* at 297, 301—an issue that will typically be the same as the question whether they entered into the contract of which the arbitration provision is a part, *see id.* at 303 (noting that formation of the arbitration agreement at issue depended on formation of the collective bargaining agreement in which it was found). The severability

principle, the Court held, does not apply where a party claims the agreement to arbitrate was never concluded, *id.* at 301—a claim that will almost always be based on a dispute over whether the party entered into the contract containing the arbitration agreement, because a party who has not agreed to *anything* cannot have agreed to arbitrate. *See, e.g., Janiga v. Questar Capital Corp.*, 615 F.3d 735, 741–42 (7th Cir.), *cert. denied*, 562 U.S. 1110 (2010).

New Prime wrongly asserts that in *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421 (2017), this Court held that the FAA applies even to "determining whether an arbitration agreement *exists*." Pet. Br. 15. But in *Kindred*, this Court held only that a state may not adopt rules of contract formation that discriminate against the validity of arbitration agreements. It did not remotely suggest that the FAA could allow enforcement of an arbitration provision against someone who did not enter into an agreement with a provision requiring arbitration. *See* 137 S. Ct. at 1428–29. Similarly unsupported is New Prime's suggestion that a court can use a delegation clause to require a party to arbitrate whether it is bound (for example, under third-party principles) by an arbitration provision in the absence of assent to the contract in which it is found. Pet. Br. 14. Read in context, the passage from *Rent-A-Center* quoted by New Prime did not address that issue; there, the Court commented only on the scope of what parties "can *agree* to arbitrate." *See Rent-A-Center*, 561 U.S. at 68. New Prime also cites appellate authority predating *Granite Rock*, but the cases postdating that decision have held that a court must decide the basic question whether a party is bound to arbitrate anything, including arbitrability, under a contract. *See,*

e.g., *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1127 (9th Cir.), *cert. denied sub nom. Toyota Motor Corp. v. Choi*, 571 U.S. 818 (2013).

Just as a court cannot separate the enforcement of an arbitration provision from a determination of whether the parties are bound by that provision, the statutory text forecloses any argument that a court can separate its decision whether to enforce an arbitration provision—including a delegation clause—from a determination of whether the FAA applies to the contract of which it is a part. Section 2 precludes application of a "severability" analysis to this issue by making the application of the Act to an arbitration provision entirely dependent on the nature of the contract of which it is a part: That larger contract must be one "evidencing a transaction involving commerce." And section 1 specifically excludes contracts of employment of transportation workers from the contracts involving commerce whose arbitration provisions are enforceable through the application of section 2. *See supra* pp. 5–8.

Thus, sections 1 and 2, together, *require* that a court look to the nature of the contract containing an arbitration provision, rather than solely at the arbitration provision itself, in determining whether the FAA applies. And because the FAA cannot require arbitration of anything (even under a delegation clause) if it does not apply, a court must necessarily resolve any issue over whether an arbitration provision (including a delegation clause) is in a contract of employment subject to section 1 before it can be required to enforce the arbitration provision.

Not only does New Prime's contrary contention contradict the clear statutory text, but accepting that

argument would mean that section 1's exclusion of employment contracts of transportation workers would never have any effect. New Prime observes that a delegation clause or other arbitration provision "is not *itself* a 'contract of employment.'" Pet. Br. 15. But if section 1 bars application of the FAA only to contracts of employment as such, and not to the arbitration provisions they contain, then it excludes *nothing* from the FAA. Even without the exclusion, the FAA would not provide for enforcement of contracts of employment in and of themselves. Reading the exclusion to exclude nothing would not only violate the fundamental canon of statutory construction against reading a law to make part of it "inoperative or superfluous," *Corley v. United States*, 556 U.S. 303, 314 (2009), but would also be wholly contrary to this Court's decision in *Circuit City*, which was premised on the understanding that the meaning of section 1 determines the scope of the FAA's application to *arbitration provisions* in contracts of employment. *See* 532 U.S. at 119.

Revealing its fundamental misunderstanding of the severability doctrine it invokes, New Prime suggests that it matters little whether its position undermines the limits on the FAA's scope set by sections 1 and 2 because, it asserts, applying the severability doctrine always has a similar effect: According to New Prime, "[t]hreshold arbitrability issues are *always* questions that go to the court's authority to compel arbitration under the FAA—if they are decided against the party seeking to compel arbitration, then there is no enforceable arbitration agreement and the FAA is inapplicable." Pet. Br. 12. That assertion gets this Court's holdings in *Rent-A-Center*, *Buckeye*, and *Prima Paint* precisely backwards. The holding of

those cases is that when a court orders arbitration of the validity of a contract under an arbitration provision contained in that contract—or arbitration of the validity of an arbitration provision under a delegation clause contained in the provision—the court is determining that there is a *valid* and enforceable arbitration provision that is subject to the FAA and that requires arbitration of the matter in question.

Thus, in each of the examples cited by New Prime (at 13), the courts determined that the issue as to which arbitration was compelled was the subject of a valid arbitration provision enforceable under the FAA; the validity of the agreement to arbitrate that issue did not, as New Prime suggests, depend on the outcome of the arbitration. Indeed, if an arbitration provision, including a delegation clause, is not itself valid, a court *cannot* enforce it: The court "must consider" a challenge to the validity of any agreement to arbitrate (including a delegation clause) "before ordering compliance with that agreement." *Rent-A-Center*, 561 U.S. at 71.

By the same token, before ordering compliance with any arbitration provision, a court must consider both whether a party assented to the contract of which it is a part and whether the FAA applies to that contract. The difference between those inquiries and the validity inquiry is that they necessarily involve consideration of the existence and nature of the larger contract containing the arbitration provision, whereas, under *Prima Paint* and its progeny, the *validity* of the arbitration provision is a separate question from the validity of the contract in which it is embedded. That difference is a result of the statutory language that makes the question of the FAA's applicability in-

separable from the nature of the contract containing an arbitration provision.

Even where the severability principle applies, moreover, it does not provide, as New Prime wrongly suggests, that an arbitration provision cannot be invalid for a reason that may *also* apply to the agreement of which it is a part. As long as the ground of invalidity applies to the arbitration provision directly, it may also apply to other provisions of the contract, or the contract as a whole. *See MacDonald v. CashCall, Inc.*, 883 F.3d 220, 226–27 & n.5 (3d Cir. 2018) ("In specifically challenging a delegation clause, a party may rely on the same arguments that it employs to contest the enforceability of other arbitration agreement provisions.") (citing *Rent-A-Center*, 561 U.S. at 74). The Court need not address this point here because of the inapplicability of the severability principle to section 1. If that principle did apply, however, it would still allow a court to follow the plain meaning of section 1 and hold a delegation provision to be outside the FAA for the same reason that the arbitration provision of which it is a part is outside the FAA: *i.e.*, that both provisions are in a contract of employment of a transportation worker to which the FAA does not apply.

New Prime insists that the argument that a court can apply the FAA only if it determines that the contract at issue is one to which the FAA applies is "circular." Pet. Br. 12. A more accurate characterization of the point that a law that is inapplicable cannot be applied might be that it is a truism—but as shown by Justice Scalia's expression of the point in *Beaty*, 556 U.S. at 864, it is a truism that is in fact true and often, as in this case, outcome-determinative. In contrast, New Prime's position, that a nested series of

arbitration provisions in a contract not subject to the FAA can bootstrap themselves into the FAA's aegis, is supported by neither the statute, this Court's cases, nor logic. No matter how many Russian-doll arbitration provisions exist in a contract, the FAA cannot require a court to enforce any of them if the contract is excluded from the FAA. And by its express terms, the FAA does not apply to any arbitration provision that is in a contract of employment of a transportation worker within the meaning of section 1 of the FAA.

Whether the contract in this case falls into that category is, therefore, necessarily an issue for a court to decide.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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No. 17-340

IN THE

Supreme Court of the United States

NEW PRIME, INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF STATUTORY CONSTRUCTION SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT DOMINIC OLIVEIRA

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are law school professors engaged in the teaching and study of principles of statutory construction.[2] We have taught, researched, and published books and articles about the importance of reading and interpreting legal texts faithfully and diligently through different analytical, rhetorical, and linguistic frames.

We write as teachers and admirers of excellent legal writing. We teach law students that the legal profession adheres to certain standards of analytical care, including that statutes are to be read with close attention to their text, context, and history. We believe our shared commitment to those standards leads to only one conclusion in this case – that application of key canons of statutory construction to the "contracts of employment" language in the Federal Arbitration Act's exemption applies to all transportation workers without exclusion of workers who are deemed to be independent contractors and without the legally protected status of "employees."

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1. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Both parties have consented to the filing of this brief.

2. Professor Nantiya Ruan was the primary author of this brief, with review by the signatories, which are listed in the Appendix to this brief.

SUMMARY OF THE ARGUMENT

The First Circuit's opinion in *Oliveira v. New Prime, Inc.*, reflects a well-reasoned, thoughtful approach to statutory construction. Petitioner attempts to upend that decision and contorts the canons of statutory construction beyond their reasonable parameters in a miscarriage of justice. We agree with Justice Antonin Scalia and Bryan A. Garner that the legal system relies upon a "sound approach" in interpreting legal texts. A. Scalia & B.A. Garner, *Reading Law: The Interpretation of Legal Texts* 3 (2012). Concluding that the "contracts of employment" statutory exception in the Federal Arbitration Act of 1925 (FAA)[3] is limited to only those with the legal status of "employees," is not sound.

First, the words in statutes are read in light of their ordinary, plain meaning. Also, those words are understood from the perspective of what was meant *when they were drafted*. Petitioner's argument, which rests on modern dictionary definitions instead of inquiring into the terms' meaning at the time the FAA was enacted, fails to comply with those canons of statutory construction and should be disregarded. Moreover, Petitioner incorrectly applies the *ejusdem generis* and surplusage canons to the statutory language at issue. To give merit to those arguments would undermine those canons' usefulness and purpose in supporting a system of faithful interpretation of legal texts.

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3. The FAA's Section 1 exemption states: "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.

Because the First Circuit's decision reflects the appropriate use of these important canons of construction, *Amici* urge this Court to uphold it.

ARGUMENT

I. Petitioner's Reliance on a 2014 Dictionary Definition of "Employment Contract" and the Legal Status Definitions of "Employee" Are Not Probative to what "Contracts of Employment" Meant when the FAA was Drafted by Congress in 1925.

Well-established statutory construction principles support the First Circuit's holding that the FAA's reference to "contracts of employment" means "agreements to do work" and is not limited to workers with the legal status of "employees." In arguing against this holding, Petitioner relies upon one modern dictionary definition of "employment contract" and what "employee" meant in the context of establishing legal status. Neither argument is persuasive nor probative on what "contracts of employment" means in the FAA.

A. "Contracts of Employment" in the FAA Must Be Read in its Ordinary, Fixed Meaning, which Supports the First Circuit's Interpretation.

It is axiomatic that statutory construction begins with the plain language of the statute by giving its words their ordinary meaning. "The ordinary-meaning rule is the most fundamental semantic rule of interpretation" and "[i]nterpreters should not be required to divine arcane nuances or to discover hidden meanings." A. Scalia & B.A. Garner, *Reading Law: The Interpretation of Legal*

Texts 69 (2012). "[T]he meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain .... the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442 (1917). In essence, "[w]ords are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense." Scalia & Garner, *supra*, at 69.

Moreover, statutory words and phrases are given their ordinary meaning at the time of adoption. This "fixed meaning canon" requires that words be "given the meaning they had when the text was adopted." *Id.* at 78. The Court's "job is to interpret the words consistent with their 'ordinary meaning . . . at the time Congress enacted the statute.'" *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (citing *Perrin v. United States*, 444 U.S. 37, 42, 100 S. Ct. 311, 62 L. Ed.2d 199 (1979)). The meaning of words in legal rules should be constant because "[w]ords change meaning over time, and often in unpredictable ways"; accordingly, "misunderstand[ing] and misrepresent[ation]" arises if meanings are not held constant. Scalia & Garner, *supra*, at 78. Importantly, "[w]hile every statute's *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world." *Wis. Cent. Ltd.*, 138 S. Ct. at 2074 (emphasis in the original) (noting that "money" meant "medium of exchange" when the statutory language was enacted, but what qualifies as a "medium of exchange" may "depend on the facts of the day").

For example, in *Perrin v. United States*, this Court rejected the argument that the Travel Act incorporated the common-law definition of "bribery" because, by 1961 when the Act was passed, "the common understanding and meaning of 'bribery' had extended beyond its early common-law definitions." 444 U.S. 37, 45, 100 S. Ct. 311, 315-16, 62 L. Ed.2d 199 (1979). For this reason, the Court concluded that "the generic definition of bribery, rather than a narrow common-law definition, was intended by Congress." *Id.* at 49, 100 S. Ct. at 317.

Together, these two statutory construction canons instruct that the phrase "contracts of employment" must be given their everyday, ordinary meaning at the time the FAA was adopted in 1925, unless there is evidence of a technical meaning. That is precisely what the First Circuit did in its decision below in interpreting the FAA's exemption at issue. After determining that in 1925, "contracts of employment" did not have a technical legal definition (either statutorily or in the common law), and analyzing what "contracts" and "employment" meant by looking to contemporaneous authorities, the court held that "contracts of employment" meant "agreements to perform work," not limited to workers who could prove or had already proved (under an entirely different legal framework from the FAA) that they were "employees." *See Oliveira v. New Prime, Inc.*, 857 F.3d 7, 17-22 (1st Cir. 2017).

Petitioner's position that the phrase "contracts of employment" excludes independent contractors hinges on the argument that "contracts of employment" did have a technical meaning in 1925. But Petitioner fails to make that case when it relies solely upon the definition of

an "employment contract" from the 2014 Tenth Edition of *Black's Law Dictionary* as a "contract between an *employer and employee* in which the terms and conditions of *employment* are stated." Pet. Br. at 17 (emphasis in original) (citing *Black's Law Dictionary* 393 (10th ed. 2014)). Petitioner's reliance on the 2014 Black's Law Dictionary is unavailing. First, while the 2014 edition indicates that the term "employment contract" was first used in 1927, it does not provide a 1927 definition and instead, only supplies the modern one (to which Petitioner relies). The 2014 definition is not the definition used in 1927; instead, the date indication merely shows that 1927 was the earliest known usage of that phrase. Black's Law Dictionary states that "[t]he parenthetical date preceding many of the definitions show the earliest known use of the word or phrase in English." *Black's Law Dictionary* (10th ed. 2014), *Guide to the Dictionary*, at xxvi. The conclusion that "employment contracts" or "contracts of employment" were not used as common phrases with technical meanings is supported by the fact that neither the 1910, nor the 1933 editions of Black's Law Dictionary have entries for either phrase. *See Black's Law Dictionary* (2d ed. 1910); *Black's Law Dictionary* (3d ed. 1933).

Moreover, because the earliest known usage (1927) is two full years after the enactment of the FAA (1925), Petitioner's argument clearly and unmistakably violates the fixed-meaning canon. Petitioner cites no other authority for narrowly defining "contracts of employment" to exclude certain workers.

To bolster this thin record, Petitioner relies upon several different legal frameworks for determining "employee" status, as controlling. *See* Pet. Br. at 17-22.

Relying on what an "employee" means in tort or labor law is not conclusive to what "employment" means for purposes of the FAA simply because both words have the common root "employ." It makes no linguistic sense for "contracts of employment" to mean only "contracts that create an employee relationship," as opposed to "contracts for work." *See* Scalia & Garner, *supra*, at 45-46 (it is "verbal legerdemain" to use the legal term of art for "damages" to interpret what "damage" means in a statute). For example, this Court reversed a lower court for interpreting what "personal" means by relying upon the meaning of "person" just because it shares a common root. *FCC v. AT&T Inc.*, 562 U.S. 397, 401, 131 S. Ct. 1177, 1181, 179 L. Ed. 2d 132 (2011) (reversing lower court and holding in a statutory interpretation case that the ordinary meaning of "personal" is derived from the word "person"; disagreeing with the lower court's reasoning that "the root from which the statutory word [personal] ... is derived" is the defined term "person"). Similarly, "employment" has its own meaning separate and apart from the legal status of "employees" and the First Circuit correctly interpreted "employment" by looking at legal authorities in 1925, to decide that it encompassed broad forms of work arrangements.

Despite its own leap from using the legal status of employees to understand what "employment" means, Petitioner argues that the First Circuit's "cobbl[ing] together" a meaning of "employment" separate from "contracts of employment" is in error. Pet. Br. at 23-24. The First Circuit correctly looked to contemporaneous dictionary definitions of "employment" as "an act of employing" and the verb "employ" as "to make use of the services of; to have or keep at work; to give employment to." *Oliveira*, 857 F.3d at 20.

In contrast to Petitioner's argument, courts routinely look to the words of a phrase to assess its meaning. "It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute." *United States v. Menasche*, 348 U.S. 528, 75 S. Ct. 513, 99 L. Ed. 614 (1955). For example, in *Kirtsaeng v. John Wiley & Sons, Inc.*, the Court held that "each word of the five-word phrase [at issue] had a distinct purpose." 568 U.S. 519, 530, 133 S. Ct. 1351, 1358, 185 L. Ed. 2d 392 (2013) ("The first two words of the phrase, 'lawfully made,' suggest an effort to distinguish those copies that were made lawfully from those that were not, and the last three words, 'under this title,' set forth the standard of 'lawful[ness].'"). *See also Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1842 (2018) (in interpreting the phrase "solely by reason of a failure to vote" in the NVRA, holding that "the meaning of these words is straightforward. 'Solely' means 'alone' . . . . And 'by reason of' is a 'quite formal' way of saying '[b]ecause of.'") (internal citations to dictionaries omitted).

In sum, the First Circuit's interpretation of "contracts of employment" is faithful to both the ordinary meaning *and* fixed-meaning canons and should be upheld.

B. Reading "Contracts of Employment" in the Context of the FAA Further Supports the First Circuit's Interpretation.

Statutory construction also requires employing a "fair reading" methodology to comprehend the "purpose of the text," which is a "vital part of its context." Scalia & Garner, *supra*, at 33. "Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any

precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486, 126 S. Ct. 1252, 1257, 163 L. Ed. 2d 1079 (2006). *See also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115–16, 121 S. Ct. 1302, 1309, 149 L. Ed. 2d 234 (2001) ("We must, of course, construe the 'engaged in commerce' language in the FAA with reference to the statutory context in which it is found and in a manner consistent with the FAA's purpose."); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S. Ct. 1579, 6 L. Ed.2d 859 (1961) ("[A] word is known by the company it keeps.").

The phrase "contracts of employment" is part of the explicit carve-out to the FAA's federal policy favoring arbitration agreements. Section 1 of the FAA provides that the Act shall not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. This Court has interpreted this section to "exempt[ ] from the FAA. . . contracts of employment of transportation workers." *Circuit City*, 532 U.S. at 119, 121 S. Ct. 1302. In so holding, the *Circuit City* Court acknowledged "Congress' demonstrated concern with transportation workers and their necessary role in the free flow of goods" at the time of enactment. 532 U.S. at 121, 121 S. Ct. 1302. As the First Circuit noted: "Given that concern, the distinction that Prime advocates based on the precise employment status of the transportation worker would have been a strange one for Congress to draw: Both individuals who are independent contractors performing transportation work and employees performing that same work play the same necessary role in the free flow of goods." *Oliveira*, 857 F.3d at 22.

Additionally, other contemporaneous authorities from the era of the FAA's enactment suggest that "contracts of employment" were not agreements only for workers that can prove employee status. The First Circuit outlined numerous contemporaneous legal authorities, including judicial opinions, the American Law Report, and national treatises, that "suggest that the phrase can encompass agreements of independent contractors to perform work." *Id.* at 20.

Because reading "contracts of employment" in the context of the FAA and other legal authorities of the time further supports the First Circuit's holding, it should be affirmed.

II. The *Ejusdem Generis* Canon Does Not Support Limiting "Contracts of Employment" to "Employees."

Petitioner argues that the FAA's Section 1 exception is only for "*certain* 'contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,'" Pet. Br. at 24 (emphasis in original), by relying on the *ejusdem generis* canon of statutory construction, *id.* at 26-27. Because this reading does not comport with statutory construction principles, nor does it follow Supreme Court precedent, it should be ignored.

The *ejusdem generis* canon provides that, where a seemingly broad clause constitutes a residual phrase, it must be controlled by, and defined with reference to, the "enumerated categories . . . which are recited just before it," so that the clause encompasses only objects

similar in nature. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115, 121 S. Ct. 1302, 149 L.Ed.2d 234 (2001). In *Circuit City, Inc. v. Adams*, this Court analyzed the FAA's Section 1 exemption language at issue here through the lens of the *ejusdem generis* canon and determined that "the words 'any other class of workers engaged in . . . commerce' constitute a residual phrase" that followed an "explicit reference to 'seamen' and 'railroad employees." 532 U.S. 105, 114, 121 S. Ct. 1302, 1308, 149 L. Ed. 2d 234. Accordingly, the Court held that "[u]nder this rule of construction the residual clause should be read to give effect to the terms 'seamen' and 'railroad employees,' and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it." *Id.* at 105, 121 S. Ct. at 1308. The Court relied upon this interpretation based on the *ejusdem generis* canon to hold that "any other class of workers" meant "transportation workers." *Id.* at 119, 121 S. Ct. at 1311.

Here, "contracts of employment" is *not* a residual phrase to be interpreted pursuant to the *ejusdem generis* canon in support of Petitioner's argument. The *ejusdem generis* canon applies in syntactic constructions of particularized lists followed by a broad generic phrase. Scalia & Garner, *supra* at 200. *See Wash. State Dept. of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384, 123 S. Ct. 1017, 154 L. Ed.2d 972 (2003) ("Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.").

But here, "contracts of employment" comes *before* the list of "seamen, railroad employees, and any other

class of workers." *See* 9 U.S.C. §1. Petitioner urges the Court to stretch this canon to divine meaning beyond the particularized list and generalized ending phrase and look backward to give meaning to a phrase *before* the particularized list. *See* Pet. Br. at 26-27. To do so violates the explicit terms of the canon.

The *ejusdem generis* canon, as well as its interpretive cousin, *noscitur a sociis* (words are to be "known by their companions"), teach legal readers to determine what common attribute connects the words grouped together. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 225–26, 128 S. Ct. 831, 839, 169 L. Ed. 2d 680 (2008); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 81 S. Ct. 1579, 6 L. Ed. 2d 859 (1961). The common attribute that connects the items in the FAA's exclusion is work in the transportation industry, not employee status. The first item, "seamen," are not defined by their employee status, but instead, by the "operation and welfare of the ship when she is upon a voyage." *Warner v. Goltra*, 293 U.S. 155, 157, 55 S. Ct. 46, 47, 79 L. Ed. 254 (1934) (for purposes of the 1920 Jones Act, finding "a seaman is a mariner of any degree, who lives his life upon the sea. It is enough that what he does affects the operation and welfare of the ship when she is upon a voyage.") (internal quotation omitted). Taking a closer look in 1991, of what "seamen" meant in the early twentieth century, this Court held that "a necessary element" is that "a seaman perform[s] the work of a vessel." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 355, 111 S. Ct. 807, 817, 112 L. Ed. 2d 866 (1991). Importantly, the Court does not engage in an analysis of what constitutes an "employee" (such as a right to control test) in defining a seaman. Instead, it looks to the performance of work at sea.

Similarly, the second item, "railroad employee," refers to workers in the railroad industry, not to the subset of workers who could prove they were common-law servants, as witnessed by railroad legislation passed in the late nineteenth and early twentieth centuries. For example, the Erdman and Newlands Acts defined the railroad "employees" subject to the Acts as "all persons actually engaged in *any* capacity in train operation or train service of any description"—including independent contractors. Erdman Act, 30 Stat. 424 (1898) (emphasis added); Newlands Act, 38 Stat. 103 (same). Moreover, the federal Railroad Labor Board, put in place by Congress to govern labor disputes in the industry, held that "[w]hen Congress in [the Transportation Act of 1920] speaks of railroad employees it undoubtedly contemplates" not just the subset of workers who have a master-servant relationship with the railroad, but all "those engaged in the customary work directly contributory to the operation of the railroads." *Ry. Emps.' Dep't, A.F.L. v. Indiana Harbor Belt R.R. Co.*, Decision No. 982, 3 Dec. U.S. R.R. Lab. Bd. 332, 337 (1922).

What is common between the first two items in the list ("seamen" and "railroad employees") is that they perform work in transportation, not that they are both "employees." The *ejusdem generis* canon teaches that it is "[w]hen the initial terms all belong to an obvious and readily identifiable genus, one presumes that the speaker or writer has that category in mind for the entire passage." Scalia & Garner, *supra*, at 199. Moreover, the *noscitur a sociis* canon provides that when any words "are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar." *Id.* at 195. "Th[is] canon

especially holds that 'words grouped in a list should be given related meanings.'" *Id.* (citing *Third Nat'l Bank in Nashville v. Impact Ltd.*, 431 U.S. 312, 322 (1977)).

Accordingly, in interpreting the third item, "any other class of workers engaged in foreign or interstate commerce," the phrase must be interpreted by the words around it. This Court has already done so in *Circuit City* when it determined that this "residual exclusion" means transportation workers, and not all workers who engage in commerce, because the residual phrase must be read in line with seamen and railroad employees. 532 U.S. 105, 121, 121 S. Ct. 1302, 1312, 149 L. Ed. 2d 234. Note that the *Circuit City* Court did not limit the phrase to transportation "employees," but instead interpreted it to mean transportation "workers." *Id.*

This interpretation also is in line with the fair reading methodology. Again, the Court's decision in *Circuit City* is directly on point; it held that this "residual exclusion" means transportation workers, not transportation employees, because "Congress' demonstrated concern with transportation workers and their necessary role in the free flow of goods explains the linkage to the two specific, enumerated types of workers identified in the preceding portion of the sentence." *Id.* As the First Circuit pointed out, it would be "strange" to interpret the FAA's exclusion to apply only to employees given the context of the statute: "Both individuals who are independent contractors performing transportation work and employees performing that same work play the same necessary role in the free flow of goods." *Oliveira*, 857 F.3d at 22.

III. Reading the Residual Exclusion of the FAA's Section 1 to Include all Transportation Workers Does Not Make Section 2 Language Surplusage.

Petitioner argues that reading the phrase "contracts of employment" to include independent contractors would ignore the "textual distinction" between Section 1's exemption ("nothing herein contained shall apply to contracts of employment") and Section 2's substantive mandate ("[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable") and make the "evidencing a transaction" language of Section 2 "mere surplusage." Pet. Br. at 31. Because Petitioner ignores the different purposes of Sections 1 and 2, and that adherence to the ordinary meaning and surplusage canons allows for both sections to have independent operation, its argument fails.

The surplusage canon teaches that "[i]f possible, every word and every provision is to be given effect. . . . None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequences." Scalia & Garner, *supra*, at 174. Generally, "courts avoid a reading that renders some words altogether redundant," such that interpreters should give meanings to provisions that allow both "some independent operation." *Id.* at 176. *See, e.g.*, *BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 545, 114 S. Ct. 1757, 1765, 128 L. Ed. 2d 556 (1994) (holding a statutory phrase is not superfluous where it will continue to have independent meaning). However, if necessary, "a court may well prefer ordinary meaning to an unusual meaning that will avoid surplusage." *Id. See also Lamie v. U.S. Tr.*,

540 U.S. 526, 536, 124 S. Ct. 1023, 1031, 157 L. Ed. 2d 1024 (2004) ("Surplusage does not always produce ambiguity and our preference for avoiding surplusage constructions is not absolute. . . . We should prefer the plain meaning since that approach respects the words of Congress.").

Here, giving the two FAA Sections their ordinary meanings allows for independent operation of each and is therefore outside the surplusage canon. Section 1 states the specific exemption from the FAA for work contracts for transportation workers, as this Court held in *Circuit City*. Section 2 states the substantive mandate of the FAA—that arbitration agreements in maritime and commercial contracts are valid and enforceable. While one is an explicit carve-out, the other is the "centerpiece" of the FAA, providing the substantive mandate that covered agreements to arbitrate are enforceable just as any other contract. *See Vaden v. Discover Bank*, 556 U.S. 49, 64, 129 S. Ct. 1262, 1274, 173 L. Ed. 206 (2009) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985)) (internal quotation marks omitted). Because both have "independent operation" when given their ordinary meaning, Petitioner's surplusage argument fails.

Interpreting the two statutory Sections to have independent operative meaning comports with Supreme Court precedent on how the surplusage canon works in tandem with the ordinary and fixed meaning canons. For example, in *Russello v. United States*, a unanimous Court engaged in statutory construction of the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970, 18 U.S.C. §§ 1961–1968. 464 U.S. 16, 17, 104 S. Ct. 296, 297, 78 L. Ed.

2d 17 (1983). At issue was interpreting RICO's forfeiture provision, § 1963(a)(1), and, specifically, the meaning of the words "any interest [the defendant] has acquired . . . in violation of section 1962." 464 U.S. 16, 17, 104 S. Ct. 296, 297, 78 L. Ed. 2d 17. Beginning with the ordinary meaning of "interest," the Court relied upon the word's ordinary meaning in the law (namely, an interest in real property) and refused to give it the broad reading argued by the petitioner. The Court then "fortified" its holding by looking to the context of the RICO statute's two sections and finding that its interpretation allowed for independent operation of both sections. *Id.* at 22-23, 104 S. Ct. 296, 300, 78 L. Ed. 2d 17. The Court dismissed the petitioner's argument that reading them in such a way would make the second section mere surplusage. *Id.*

In doing so, the Court pointed to the fact that the term "interest" is in different phrases in each section. The Court held that "[w]e refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship." *Id.* at 23, 104 S. Ct. 296, 300, 78 L. Ed. 2d 17.

Here too, the Court should not presume that Congress made a drafting mistake, but instead meant two different things when it drafted "contracts of employment" for Section 1's exemption and "contract evidencing a transaction involving commerce" for Section 2's substantive mandate. While the first limits the FAA's reach to exclude work contracts in the transportation industry, the second reflects the broad reach of the FAA into all other agreements involving commerce. Because both can be read to give independent, operative meaning,

this Court should recognize that difference and not assume it was a drafting mistake.

CONCLUSION

Because well-established canons of statutory construction support the First Circuit's holding that "contracts of employment" include all transportation workers, and not merely those deemed "employees," its holding should be upheld.

Dated: July 25, 2018

Respectfully submitted,

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No. 17-340

In The Supreme Court of the United States

NEW PRIME INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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INTEREST OF THE *AMICI CURIAE*[1]

Steve Viscelli is a sociologist at the University of Pennsylvania who studies work, labor markets, and public policy related to freight transportation, automation and energy. His primary research focuses on how state policy and informal labor market institutions shape the behavior of workers and firms. Viscelli's last research project examined the effects of deregulation on labor markets and the labor process in the trucking industry and culminated in a book, *The Big Rig: Trucking and the Decline of the American Dream* (2016, University of California Press), in which he examines how long-haul trucking was transformed from being one of the best to one of the toughest blue-collar jobs in the United States. His current book project explores the policy and politics of self-driving trucks and their potential impacts on truck drivers. He submits this brief to provide a better picture of the economic incentives at work in the trucking industry.

Domingo Avalos, Gabriel Procel, Brion Gray, James Zuber, Hector Zelaya and Desiree Ann Wood are current or former owner-operator or Lease-Operator truck drivers.

The Wage Justice Center is a 501(c)(3) non-profit organization that advocates for economic justice in

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[1] In accordance with Rule 37.6, counsel for the *amici curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amici curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission. Both parties have consented to the filing of this brief.

California's working communities. It represents low-wage workers facing nonpayment of wages and advocates for policy changes that benefit workers.

REAL Women in Trucking, Inc. is a 501(c)(6) trade association that promotes safety, education, and support networks for truck drivers. REAL Women in Trucking, Inc. helps those in the trucking industry assert their workplace rights and advocates for stronger protections for truck drivers of all classifications.

This brief will aid the Court because it presents arguments and insights on the history of the Owner- and Lease-Operators in long-haul trucking, as well as public policy surrounding the issues presented that are not represented in the lower court opinions or the parties' briefs on record.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner New Prime, Inc. ("Prime"), like other trucking firms, operates under a relatively new economic structure: the "Lease-Operator" model. This system, however, often harms employees by misclassifying them as independent contractors. It also poses a serious threat to the nation's trucking industry which, in turn, jeopardizes the economy.

Firms like Prime attract newcomers to the industry by promising autonomy and stable work. Under the Lease-Operator arrangement, however, drivers can

easily work 40 hours or more per week and still end up *owing money* to their employer. It should be no surprise that "Lease-Operator" firms like Prime often have a turnover rate of well over 100% on an annual basis.

The Federal Arbitration Act prohibits courts from applying the statute to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The Court should include the employment arrangements of drivers like Respondent who are misclassified by their employers within the definition of "contracts of employment."

A BRIEF HISTORY OF THE ORIGINS OF LEASE-OPERATOR FIRMS

Respondent Dominic Oliveira is one of tens of thousands of Lease-Operators, workers classified as independent contractors. Lease-Operators are workers who lease equipment from the same motor carriers by whom they are employed. Lease-Operators generally pay all of the expenses associated with operating the equipment. However, Lease-Operators do not have the "operating authority" to contract to haul interstate freight for customers in compliance with federal law. Instead, Lease-Operators operate under the legal authority and within the operations of the motor carrier for which they work.

Within these operations, Lease-Operators are managed in a manner virtually identical to other

"company drivers" properly classified as employees by the motor carrier.

Lease-Operators are most common at firms that employ inexperienced truck drivers.[2] Increasingly they are, like Mr. Oliveira, completely new to the industry and presented with the choice of being an employee or a Lease-Operator as soon as they complete their initial training to be a truck driver.

Contrary to the suggestion of Petitioners and their *amici*, these Lease-Operators are neither a "long-standing tradition in the trucking industry" nor critical to the bulk of freight movements in the U.S. Instead, the Lease-Operator management model is a labor strategy of relatively recent origin used primarily in two very competitive segments of the long-haul industry – refrigerated truckload and dry van truckload. Firms engaged in these segments have employed this strategy to gain a competitive advantage in labor costs and to insulate themselves from the risk of the inherently volatile markets in which they operate.[3] Prime uses drivers like Mr. Oliveira to haul freight in interstate commerce and treats them like employees. It should not be permitted to shield this arrangement from judicial review by relegating all disputes by its drivers to individual arbitration.

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[2] Viscelli, Steve, 2016, *The Big Rig: Trucking and the Decline of the American Dream*. Oakland: University of California Press, Chapter 3.

[3] Viscelli, Chapter 6.

For most of the twentieth century, large trucking firms were profitable and truck drivers, most of whom were members of the International Brotherhood of Teamsters, were among the nation's highest paid blue-collar workers.[4] Before the 1970's pushed the industry to deregulate, extensive economic regulation – made possible by the Motor Carrier Act of 1935 (P.L. 74-255, 49 Stat. 543) – helped the trucking industry restrict both immediate price competition and market entry, creating both profit for trucking companies and high wages for drivers.

The Carrier Act was passed, in part, to address the industry's tendency to create excessive competition. Two trucking-specific conditions led to this excessive competition: First, because trucking lacks asset specificity, trucks are, for the most part, interchangeable and readily available – lowering the barriers to entry. As a result, at times when trucking is profitable, new firms are able to enter the market and existing firms can increase capacity quickly.

Second, because trucking is a derived-demand industry and subject to high market volatility, productivity is entirely dependent on the immediate demand for its services from customers. When demand slackens, some portion of equipment, facilities, and labor will be immediately underutilized. When that happens, firms may have strong incentives to "keep the wheels rolling"

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[4] Belzer, Michael, 2000, *Sweatshops on Wheels: Winners and Losers in Trucking Deregulation*. New York: Oxford University Press.

by cutting the rate they charge customers, even taking a loss on individual loads to maintain market share or generate revenue to cover fixed expenses and survive down periods. These characteristics mean there is significant risk but very little, if any, profit made by simply owning trucks as an asset.

During the mid-twentieth century, the rise of collective bargaining allowed for wages to be taken out of competition and working conditions standardized across much of the nation. The dominant firms, known as less-than-truckload ("LTL") firms, hauled relatively small loads and used terminal systems to combine the types of goods they had the federal authority to haul based on origins and destination. Firms that held similar authorities set rates cooperatively amongst themselves, which then were approved by the ICC and made public. In short, trucking firms in most segments of the industry did not compete based on how much they paid workers or working conditions. Because regulation restricted market entry, these firms were able to pass higher labor costs on to consumers in the form of higher prices.[5]

The late 1970's ushered in a new wave of deregulation to "promote competitive and efficient transportation services" and "allow a variety of quality and price options to meet changing market demands."[6] The

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[5] See James, Ralph C., and Dinerstein, Estelle, *James Hoffa and the Teamsters*. Princeton: Van Nostrand, 1965. Also, Sloane, Alfred, *Hoffa*. Cambridge. MA: MIT Press, 1991.

[6] 49 U.S.C. § 13101 (LexisNexis, Lexis Advance through P.L. 115-196, approved 7/7/18).

Motor Carrier Act of 1980 significantly reduced the level of federal regulation in the trucking industry. Then, with the ICC Termination Act of 1995, Congress finally ended sixty years of motor carrier regulation. This act eliminated virtually all economic control of motor carriers and abolished federal oversight over the industry.

The consequences of this deregulatory push were swift and robust. The Motor Carrier Act of 1980 plunged the industry into chaos as destructive competition immediately became the norm. By freeing carriers from needing hauling authorities for specific goods and places, the vast majority of the leading LTL firms were driven out of business as new "truckload" firms began by-passing terminals and hauling whatever freight they could find. Intense cost-cutting competition triggered lower wages, greater amounts of unpaid work, and less desirable working conditions for truckers. Total employee compensation per mile fell by 44% in long-haul trucking from 1977 to 1987.[7] Within two decades of deregulation conditions had deteriorated so much that Dr. Michael Belzer, a leading economist of the industry, characterized some long-haul trucks as "sweatshops on wheels."[8] These conditions upended

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[7] Corsi, Thomas M., and Stowers, Joseph R., 1991, *"Effects of a Deregulated Environment on Motor Carriers: A Systematic Multi-Segment Analysis."* Transportation Journal 30:4-28.

[8] Belzer, Michael, 2000, *Sweatshops on Wheels: Winners and Losers in Trucking Deregulation.* New York: Oxford University Press.

labor-capital relations and worker churn became the norm.

To survive, carriers began subcontracting to independent owner-operators. Subcontracting to these owner-operators, who worked primarily in the unregulated field of agricultural hauling, allowed larger motor carriers to shed the costs of expensive, inflexible unionized labor. Trucking firms also used independent owner-operators as a means to avoid the risk of owning their own trucks under the chaotic and hyper-competitive market conditions of the time.[9]

Still, the shift to independent owner-operator labor was short-lived. Despite carrier interest, by the mid-1980's this labor supply declined rapidly as intense competition and declining freight rates bankrupted many trucking firms, including owner-operators. That allowed the most profitable for-hire motor carriers to quickly grow truckload firms and generate profits by leveraging non-union employee drivers and altering route planning and selection. Independent owner-operators were squeezed by declining rates and were no longer able to invest sufficiently in their equipment, which led to poor customer service and a loss of productivity.[10]

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[9] Nickerson, Jack A. and Silverman, Brian B., 2003, "*Why Firms Want to Organize Efficiently and What Keeps Them from Doing So: Inappropriate Governance, Performance, And Adaptation in a Deregulated Industry.*" Administrative Science Quarterly 48 (2003): 433-65.

[10] Corsi, Thomas M. and Grimm, Curtis M., "*ATLFs: Driving Owner-operators into the Sunset.*" Journal of Transportation

The high asset utilization rates achieved by the profitable long-haul truckload companies that emerged after deregulation required dependable trucks and drivers that would accept nearly every load that was assigned to them. These needs intensified as the biggest firms developed increasingly sophisticated load planning with the assistance of new communications technologies in the 1990's.

Most important in terms of technology were satellite-linked computers onboard trucks, like the Qualcomm unit that Prime required Mr. Oliveira to use while working for Prime.[11] Truck drivers at Prime are monitored on a regular basis via satellite-linked computers, commonly referred to as "Qualcomms" – the name of the most common systems manufacturer. Prime's contracts require that all lease-purchase operators use Qualcomm units in their trucks. These Qualcomm units, as suggested above, are extensively used in the industry and can be configured to collect a range of information depending on the settings of the basic software and various add-on software packages available from Qualcomm. The system can also inform managers whether the truck is running, the vehicle's speed, how much fuel it has used, its odometer reading, and a whole range of potential other information, all in real time. The most central features of the basic

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Research Forum 29 (1989): 285-90. Also Corsi, Thomas M. and Grimm, Curtis M., *"Changes in Owner-Operator Use, 1977-1985: Implications for Management Strategy."* Transportation Journal 26, no.3 (Spring 1987): 4-16.

[11] JA66.

software allow for regular updates of vehicle location and speed. This information is sent at regular intervals that can be specified by the firm. Authorized software users, typically including driver managers, can also "ping" trucks, requesting this information from the truck. This information allows managers to track the progress of trucks and determine whether they are on-time to meet delivery estimates provided to customers.

Qualcomm records produced in another case against Prime show that driver managers use this information to directly manage Lease-Operators as one would expect for employees.

These satellite systems allowed firms, for the first time, to monitor drivers in real time and to use that information to direct drivers' activity and coordinate it with that of other drivers. These tools became essential to ensuring efficient operations and creating the level of service customers came to expect in the era of increasingly lean inventories.[12]

As this system developed, independent owner-operators were increasingly seen as unwilling or unable to submit to monitoring and control of these new management systems and maintenance schedules that came to dominate long-haul truckload trucking of refrigerated and dry freight. As a result, although the

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[12] For a detailed account of how this technology allows Prime to monitor Lease-Operators to ensure on-time delivery, see USDOL Hr'g Tr. 58-59, *In the Matter of: Cynthia Rae Ferguson v. New Prime, Incorporated*, 2011 DOL Ad. Rev. Bd. LEXIS 81, on file with author Steve Viscelli.

low pay and reduced capital costs of independent owner-operators were appealing, the number of loads hauled by independent owner-operators in these segments dropped dramatically.[13]

Post-deregulation, the need for control and expensive equipment led the leading truckload carriers to generally favor non-union employee labor. But continually deteriorating pay and working conditions caused increasingly high levels of employee turnover and associated costs. In an attempt to retain drivers longer and gain the cost advantages of the independent owner-operators of the past, carriers began experimenting with new management models. Independent owner-operators with the capital to buy the reliable trucks did not offer sufficiently cheap labor and they clearly did not afford carriers the necessary degree of control. Thus, firms began transforming the labor market institutions around contracting to create a new breed of owner-operator that would fit their needs: the Lease-Operator.[14]

Key characteristics of traditional owner-operators – such as choosing when to work and what loads to haul based on price competition – are fundamentally at odds with the approach taken by the dominant truckload firms. Lease-Operator firms like Prime need workers who, despite having no capital or credit, will

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[13] Corsi, Thomas M., and Stowers, Joseph R., 1991, "*Effects of a Deregulated Environment on Motor Carriers: A Systematic Multi-Segment Analysis.*" Transportation Journal 30:4-28.

[14] See Cullen, D., "*Owner-operators: A Measure of Success.*" FleetOwner, June 1, 1998, p. 36. Also see Viscelli, Chapter 3.

pay for equipment and take whatever load is offered to them. These firms have re-framed this practice on paper to make it appear as though they are not telling their drivers what to do, but instead encouraging them to do what it takes to meet the needs of their customers and a smart way to "run their own small business."

Through various individual and industry-wide recruitment and informational efforts (e.g., trucking newspapers), a handful of trucking firms began to create a pool of Lease-Operators which were very different from the past owner-operators.[15] In the mid-1970's, a majority of all owner-operators were union members in many segments; virtually none are today.[16] Just before deregulation 33% of all owner-operators owned more than one truck and 16% of all owner-operators owned more than five trucks.[17] By 1997, less than 14% of all owner-operators owned more than 1 truck and less than 2% owned more than five trucks.[18] Perhaps most importantly, by 1997 90% of Lease-Operators

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[15] In this paragraph the term owner-operator is used because due to different survey methodologies and the changing nature of owner-operator/motor carrier relationships after the mid-70s, independent owner-operators and Lease-Operators were not always clearly distinguished in research.

[16] Wyckoff, Daryl D. 1979, *Truck Drivers in America*. Lexington, MA: Lexington Books.

[17] Agar, Michael, 1986, *Independents Declared: The Dilemmas of Independent Trucking*. Washington, DC: Smithsonian Institution Press.

[18] Belman, Dale L., Monaco, Kristen A., and Brooks, Taggert J., 2005, *Sailors on the Concrete Sea: A Portrait of Truck Drivers' Work and Lives*. East Lansing, MI: Michigan State University Press.

received their payments through a permanent lease to haul freight exclusively for a single company.[19] In contrast, only 50% of all owner-operators were under leases of thirty days or more in the mid-1970's and most of these drivers retained the right to haul for other carriers.[20]

Before deregulation, 75-80% of owner-operators hauling for larger motor carriers were paid a percentage of the load revenue and could haul for other carriers, which caused them to turn down loads to wait for better paying ones.[21] Lease-Operators, like Mr. Oliveira, in contrast, are dependent on work from a single carrier for all of their revenue, and thus are very unlikely to refuse loads. Today, there are very few independent owner-operators in the market Prime competes in, which moves primarily food freight for large customers.

ARGUMENT

I. LEASE-OPERATORS LIKE MR. OLIVEIRA ARE MISCLASSIFIED EMPLOYEES.

While there is no question that true independent-owners exist in the trucking industry, Prime's drivers certainly do not meet this classification. Independent owner-operators are distinguished on numerous

[19] Belman, Monaco & Brooks, 2005.

[20] Wyckoff, 1979; Agar, 1986.

[21] Maister, David H. 1980, *Management of Owner-Operator Fleets*. Lexington, MA: Lexington Books.

dimensions from Lease-Operators but primarily by the fact that they:

Lease-Operators	**Owner-Operators**
Operate under the authority of a motor carrier	Must have their own hauling authority (they are in fact single truck or very small for-hire motor carriers, with the legal authority to haul freight).
Do not deal directly with customers and generally have no knowledge of the rates or pricing used for loads	Deal directly with customers in finding and pricing loads
Are assigned loads and paid a fixed rate set by the trucking firm	Set the rates they charge to customers based on market conditions both relative to their costs and competition
Work for large trucking firms	Tend to serve predominately small shippers or concentrate on highly specialized freight that requires specialized knowledge or equipment (e.g., hauling heavy equipment) that does not provide a return to the economies of scale crucial to large truckload firms

Because Lease-Operators lease a truck and pay for fuel, maintenance, and insurance, firms can potentially shift a significant amount of capital and operating costs to them, translating into much lower labor costs per unit of work. And, though Lease-Operators are often nominally free to choose what loads they haul, they are generally under *greater* pressure than employees to accept whatever work is offered to them and to spend more days working because they need to work many more hours per day and days per year to meet fixed expenses and then earn take-home pay at levels even close to what they would earn as company drivers. Getting workers to stay on the road longer is critically important. Prime reports that its company drivers typically stay out three to four weeks at a time, Lease-Operators typically stay out five to six weeks at a time.[22]

Because of their financial vulnerability and the feared costs involved in breaking contracts and switching firms (e.g., loss of funds in escrow accounts, deposits required to lease equipment and future lease payments), Lease-Operators feel less free than company drivers to quit bad firms, resulting in lower turnover than employees when labor markets are tight and there is upward pressure on wages.

Quite simply, Lease-Operators solve the challenge of simultaneously achieving high asset utilization and customer satisfaction with cheaper labor. With Lease-Operators, when workers don't work as hard, get sick

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[22] https://www.primeinc.com/paid-apprenticeship-cdl-training/

or go home, they pay the cost of the idle equipment assigned to them. At the same time, firms don't lose the ability to manage that labor as they would any other employee. Simply because firms like Prime have refined the Lease-Operator management model and now depend on it for the bulk of their labor, does not mean they do not have the ability to adapt or that there are no other working models for sustainable labor in the industry. In contrast to Prime's practices, many other large truckload carriers still rely predominantly on very inexperienced company drivers.[23]

Prime is a firm organized for the purpose of making a profit, not as a small business incubator. The circumstances in which Mr. Oliveira found himself were deliberately structured by Prime to meet its goals. The behavior, opportunities and consequences for Prime's Lease-Operators are the result of that economic relationship. The question is: what is the nature of that relationship? Was Mr. Oliveira a misclassified employee of Prime at all times during his employment or, as the petitioners claim, was he an independent small business person while working as a Lease-Operator for Prime?

When the needs and goals of Prime are understood, what workers like Mr. Oliveira do is clearly best seen not as the result of a "business model" carried out by truck drivers such as Mr. Oliveira but, rather, a labor management strategy designed to increase the

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[23] Burks. 2007.

productivity of employee drivers and Prime's overall profitability.

Furthermore, the nature of Prime's business requires that Prime directly manage Lease-Operators like Mr. Oliveira in the same manner as it would any employee truck driver in order to realize its own interests. Prime does not "buy" discrete units of trucking service from Lease-Operators as one business would from another (using a contract that specifies a particular *outcome*). Instead, Prime "makes" trucking service – that is its core business – and Prime utilizes Lease-Operator labor to carry out that business. Prime manages the labor activity of Lease-Operators as they go about doing their work to ensure that they meet Prime's customers' demands, increase the utilization of Prime's assets, etc. Prime also monitors the labor activity of Lease-Operators and, when Prime management perceives that the firm's goals are in jeopardy (e.g., that a delivery to a valued customer might be late), it intervenes by directing the Lease-Operator's labor activity or by coordinating the labor activity of the Lease-Operator with that of other workers (e.g., it swaps loads between tractors to ensure on-time delivery).[24] From an economic perspective, monitoring, directing and/or coordinating the labor activity of workers in order to realize one's own economic interests of making a profit is the very essence of what it means to *employ*.

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[24] Ferguson USDOL Hr'g Tr. 56-58.

A. Prime's Lease-Operator Management Model is Part of a Coordinated Labor Supply and Management System.

The Lease-Operator model is one component of the overall labor recruitment and management strategy at Prime. It is important to understand how it fits with the other components, particularly to understand how and why, in the event they are actually given a choice, workers might choose to become Lease-Operators without appreciating the consequences. Recruiting and training inexperienced drivers allows firms like Prime to home-grow Lease-Operators. Firms want drivers to follow a career path from trucking school to employee trainee to lease-operating. This is what firms in the industry refer to as their labor "pipelines." Again, the Lease-Operator management model is not a "business model" but a central part of Prime's overall labor supply and management system.[25]

Some trucking carriers provide better compensation to their workers, have more experienced drivers and save on training, recruitment, insurance and other costs. Instead of paying high wages, firms like Prime use inexperienced workers, pay them less and employ a number of coordinated strategies to delay worker exit for experienced workers without raising wages.

Relying on completely inexperienced drivers requires training them, and the need to train new workers has segmented truckload employers into those

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[25] https://www.trucknews.com/features/prime-inc-travelled-a-rocky-road-to-prosperity/

firms that recruit and hire inexperienced drivers and those that do not. While small- and medium-sized firms are unlikely to hire drivers with less than one year of experience due to the cost of training and insuring them and their lower productivity, several dozen of the largest firms, including Prime, have established training programs that allow them to hire drivers with no experience at all.

Operating a training program is a major undertaking and potentially a significant cost to carriers. Prime, like others, uses a contract that requires workers to work for them for a year or pay for training. Economists Hoffman and Burks (2013) concluded that training contracts have reduced quitting at trucking companies significantly.[26] Carriers typically charge drivers more than what they expend on actual training costs. Prime's training contract for what they characterize as a "paid-apprenticeship" requires drivers to work for a year or pay the company $4,475.[27] And, thus, many of the workers who try out trucking every year do so under a modern form of debt peonage.

Once workers can leave without penalty from the training contract – one year of safe driving experience makes a big difference in this labor market – options at better-paying truckload, local, niche, or private

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[26] Hoffman, Mitchell and Burks, Stephen V. 2013. *Training Contracts, Worker Overconfidence, and the Provision of Firm-Sponsored General Training*, available at: http://dx.doi.org/10.2139/ssrn.2220043

[27] https://www.primeinc.com/paid-apprenticeship-cdl-training/

carriers with better work routines and pay begin to open up. To retain these more experienced drivers, truckload carriers, trucking media, and third-party "business consultants" convince workers to become Lease-Operators, promising that lease-operating will be financially rewarding and give workers additional control over working conditions. But, as suggested above, being a lease-operator ends up being worse for most truckers than being an employee. Simply put, it allows carriers to pay more productive drivers far less than they are worth in relation to other employers in terms of productivity.

Prime and several of its closest competitors in refrigerated truckload freight, like CR England, have recently taken the Lease-Operator management model to a new level. While other firms in the segment typically do not encourage workers to become Lease-Operators until they have six months or a year of experience in the industry, these firms aggressively recruit drivers with no experience at all to be Lease-Operators right out of their initial training – as Prime did with Mr. Oliveira. One of the biggest changes in the Lease-Operator model in recent years is that workers brand new to the industry are paying the entire cost of operating trucks before they can earn any take-home pay. As the evidence in this case makes clear, these drivers not only pay all of these costs but can receive no pay in some weeks that they work. During such weeks, not only does Prime benefit by their drivers' free labor, but they also prosper from the drivers' covering all of the expenses for their trucks. This simply could not occur

in the traditional employment context, and it is difficult to imagine a labor management strategy that would make Prime more competitive than that.

B. Prime Employs Lease-Operators to Perform its Core Business.

Prime's core business is hauling truckload refrigerated freight for large customers. In simple terms, Prime's profitability rests on two core activities: (1) sales activities to find the highest revenue freights to haul; and (2) operations oriented to deliver that freight at the lowest possible cost while fulfilling contracts and satisfying customers. Truckload refrigerated firms like Prime use their resources and relationships with customers to find the highest revenue freight based on predictions of where Prime trucks – both company and Lease-Operator – will be in the future. The sales staff then makes commitments to Prime's customers based on predictions of the operational capacity of the company. In other words, sales staff make contracts to haul freight at a particular price with a given set of characteristics and requirements without any input from or agreement with the drivers – company or Lease-Operators – that will haul it. Prime, in conducting the sales side of its business, does not distinguish between the freight that will be hauled by Lease-Operators and employee drivers. That is a future concern dealt with by the planning and dispatching staff in operations. This means that Prime conducts all of this important work with an eye toward its own interests.

It is then the operations side of the business that is charged with producing the outcomes promised – the delivering of freight from and to particular locations within specified times to Prime's customers as efficiently and profitably as possible. That work will be done by Prime's drivers, whether they be Lease-Operators or company employees.

All drivers at firms like Prime, whether company or Lease-Operators, are not given specific information about what work is available, why work gets assigned to them, and, consequently, what latitude there is to change work assignments. They are told only that there is little flexibility, it is costly and difficult to change load assignments, and that load planning is done systematically and with the greatest possible efficiency and fairness. All of those things are true.

The key to success in load planning is finding the most immediately-available load for each truck while minimizing the number of miles all trucks travel empty to reach that load, known as deadheading. The job of load planners is to find the optimal match of available loads to available trucks.[28] This approach is the most profitable way to act in truckload freight markets and requires flexibility in terms of drivers' work schedules and geographic range. The assignment of loads is interdependent and so if Lease-Operators turn down loads, it can cause a major headache for load planners, who must often rework other drivers' assignments in order to compensate. Driver managers have

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[28] Ferguson USDOL Hr'g Tr. 25.

plenty of leverage over Lease-Operators to ensure that they take the loads assigned to them – they can simply threaten to idle them because nothing else is available.[29]

Nearly all truck drivers working in the over-the-road truckload industry are paid either by the mile, as Prime's company drivers are, or by a percentage of the load, as Prime's Lease-Operators are. Truckers try to find the most efficient ways to organize their work tasks in order to increase their pay – *regardless of whether they are employees or Lease-Operators.*

Drivers will make essentially the same kinds of decisions to drive as many paid miles as possible. Though having the ability to choose loads and how they haul loads is common in the rhetoric about the differences between Lease-Operators and employees, at firms like Prime there is no meaningful difference in how these workers are assigned work or managed as they carry it out. Prime controls and assigns all work available to its Lease-Operators. What lease-operating does is raise the stakes for workers to ensure they make the most out of the equipment they are paying for, something that makes them more productive and thus more profitable for Prime. In fact, Prime's founder and CEO Mr. Low often refers publicly to the firm's move from employees to owner-operators as one intended to achieve "alignment" of interests.[30]

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[29] Viscelli, Chapter 4.

[30] https://www.trucknews.com/features/prime-inc-travelled-a-rocky-road-to-prosperity/

Despite this alignment of interests through the compensation scheme, once a driver is under way with a load, Prime driver managers do extensive monitoring and direction of Lease-Operators.[31] Their job is what their name implies: to manage drivers. They do this because ultimately Prime is responsible for making on-time trucking service and Prime retains the authority to manage workers to achieve that end.

Perhaps the clearest indication that Lease-Operators are treated like employees is that their labor activity is coordinated with that of other employees of Prime. The clearest example of this is when a driver manager "repowers" loads.[32] A repower is essentially any time when a driver is given a load to haul but cannot complete it in the time required and so Prime coordinates the load being handed off to another driver to ensure on-time delivery.

This kind of management is entirely inconsistent with the idea that Prime is buying or contracting the services from a separate, distinct transportation company. This would be like you or I contracting with FedEx to transport a parcel for us and, as we are tracking the progress of the parcel online, we realize it will not arrive when we want it to. We would then call a UPS driver and instruct him on when and where to meet the late FedEx driver to ensure a hand off of the package for on-time final delivery. What Prime is doing

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[31] Ferguson USDOL Hr'g Tr. 58-63.

[32] Ferguson USDOL Hr'g Tr. 56-57.

when it repowers loads is clearly directing workers in the making of trucking services.

C. Prime's Lease-Operators are Employees for all Intents and Purposes.

Prime's Lease-Operators are employees, not small business owners. Prime's Lease-Operators cannot and obviously do not "make" trucking services on their own. Prime's Lease-Operator business model is part of the firm's overall labor supply and management system. In fact, Lease-Operators are managed right alongside and simultaneously with company drivers. The only important difference between company drivers and Lease-Operators is that Lease-Operators are responsible for fixed and operating costs, which allows Prime to work them harder and pay them far less.

Prime staff actively manages Prime Lease-Operators as if they were employees, regularly monitoring their activity in real time. There are also clear indications that Prime coordinates the labor of the Lease-Operators with other workers in order to achieve its goals, most importantly, ensuring on-time deliveries of loads. From an economic perspective, the use and management of Prime Lease-Operators is a central part of Prime core business and thoroughly integrated in the most critical processes of that business with the labor of employees.

Prime Lease-Operators do not and cannot independently perform many of the essential tasks required to provide trucking services to customers. In

other words, they simply could not move freight without Prime. They do not find loads, engage with customers to negotiate prices for their services, provide meaningful capital investments or do a wide range of other kinds of work that is required for participation in the business of trucking, including the most fundamental requirement of obtaining the legal authority to provide freight services.

Despite the terms applied by Prime to their situation and behavior, Prime Lease-Operators clearly behave and are treated like employee truck drivers.

D. The Lease-Operator Model negatively Affects Workers.

True independent contractors make daily choices about their working conditions. They can refuse a load that does not pay well. They can take a break when they are tired. As explained below, misclassified drivers do not enjoy these same freedoms.

The experience of *amicus curiae* Domingo Avalos provides an example of a Lease-Operator who is micromanaged by his employer as he does the company's core business.[33] Mr. Avalos has been a truck driver for XPO Cartage Inc. ("XPO") at the Ports of Los Angeles and Long Beach in California since 2010. The State of California's Department of Industrial Relations, Division of Labor Standards Enforcement ("DLSE") found

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[33] All information in this section is based on an interview conducted with Mr. Avalos on July 5, 2018.

in December 2016 that Mr. Avalos has been misclassified as an independent contractor. The DLSE further found that he is owed $171,938.25 in back wages, reimbursable business expenses and interest.[34]

Mr. Avalos picks up freight containers at rail yards in the Los Angeles area and delivers them to XPO's customers throughout Southern California. Despite being classified as an independent contractor, Mr. Avalos conducts only the regular work of XPO, which is transportation and logistics. He has no customers or accounts of his own and does not interact with any of XPO's customers. He does not have an incorporated business of any type. XPO dispatches Mr. Avalos to all of his jobs. When Mr. Avalos drives, his truck bears an XPO logo. He may not change or remove the logo, nor put another logo alongside it. He may not make deliveries for companies other than XPO. His routes are set by XPO. When he is not carrying loads for XPO, he is required to park the truck in XPO's lot.

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[34] The DLSE found that when properly classified as an employee, Mr. Avalos is owed $128,396.48 in back wages, $38,290 in reimbursable business expenses and $5,251.77 in interest. XPO has appealed this determination. These amounts accrued over a period of three years, between January 26, 2013 and January 26, 2016, the date on which Mr. Avalos filed his complaint with the DLSE. Under California law, the Statute of Limitations for claims based on statutory rights is three years from the date the right to reimbursement occurred. Mr. Avalos began working for XPO on June 1, 2010. The wages the DLSE found to be owed to Mr. Avalos represent about half the total he would be owed if some of his claims were not time-barred. *Order of the Labor Commissioner of the State of California, Case Number 05-66468 KR.*

After about two years of driving a truck for XPO, Mr. Avalos was told by his employer he would have to lease a truck from the company to continue driving for them. He was required to sign all the paperwork in a large stack of documents. Mr. Avalos is a native Spanish speaker, and estimates that he understands about 10% of spoken English. He cannot read or write in English. Despite this, Mr. Avalos did not have the opportunity to review the paperwork before signing. His employer told him where to sign and initial the documents, which were provided in English exclusively. Among these papers was an agreement to arbitrate. Also included was the lease agreement, whose terms Mr. Avalos was eventually unable to meet. Within three years, he had to give up his lease on the truck. Since this time, he has been driving other drivers' trucks for XPO, and paying the other drivers a fee to do so.

The story of *amicus curiae* Gabriel Procel provides an example of the limited control over the terms and conditions of work some owner-operators enjoy. Mr. Procel has been a truck driver at the Port of Elizabeth in New Jersey since 1998.[35] During this time, Mr. Procel has worked as an owner-operator for about 15 trucking companies.

When Mr. Procel first applied to be a truck driver, he was not offered a contract for full-time employment. Instead, he was offered an independent contracting

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[35] All information in this section is based on an interview conducted with Mr. Procel on July 12, 2018.

agreement. Under the terms of this agreement, the trucking company would lease Mr. Procel's truck in order to insure it when it was carrying their loads. This prevented him from driving for any other companies. He was also instructed to set up his own company. He was referred to a nearby accountant who assisted him in setting up a company in his name. Mr. Procel was then considered an owner/operator of his own company. As such, he was responsible for paying his vehicle insurance, gas, tolls, International Fuel Tax Agreement licensing fees and taxes, all maintenance of his vehicle and parking costs. He received instructions on where to pick up and take the cargo from a teller's window at the company. He was given a large sticker with the company logo to affix to his truck, and was told it must remain on the truck at all times. If Mr. Procel rejected an assignment, dispatchers would retaliate by withholding dispatches for two-or-three days, or by offering inconvenient jobs with long unpaid waiting times. Though he worked for 15 different companies, each company had substantially similar written and unwritten policies.

Mr. Procel worked eight to sixteen hours a day, five-or-six days a week, or between forty-five and ninety-six hours a week. He estimates that 50% of his take-home pay was used to pay insurance, gas, taxes, maintenance and the other expenses enumerated above.

Mr. Procel recently left his employment as a truck driver to join the Teamsters union as an organizer. He

is currently organizing workers who are misclassified as independent contractors.

The account of *amicus curiae* Brion Gray illustrates how difficult it can be to make a living as an owner-operator.[36] Mr. Gray has been driving a truck in the Northeast Corridor for the past six years. He currently drives for Maritime Delivery Services Inc. Mr. Gray's necessary business expenses as an independent contractor are $1,690 to $1,990 a week. For the last month, Mr. Gray has been living in his truck after becoming unable to afford the rent at his apartment in Hightstown, New Jersey based on his earnings as a full-time owner-operator of his own truck. In his words, the company "owns" him.

Amicus curiae Hector Zelaya attempted to work for more than one trucking company at a time, and found out he did not have the independence to make such a choice. Mr. Zelaya is an owner-operator who works in and around Southern California for K&R Transportation LLC ("K&R").[37]

When Mr. Zelaya went to work for K&R, they gave him explicit instructions on how to register a company in his name. Once registered, K&R installed a GPS system on Mr. Zelaya's truck, as well as a variety of stickers and licensing decals bearing the company name. The company told Mr. Zelaya he was required to have

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[36] All information in this section is based on an interview conducted with Mr. Gray on July 18, 2018.

[37] All information in this section is based on interviews conducted with Mr. Zelaya on July 10 and 21, 2018.

the GPS system turned on at all times. He is paid a set amount for each delivery of a load K&R assigns to him. He has no power to negotiate his rates nor the option to refuse an assignment.

When Mr. Zelaya questioned the profitability of an assignment (i.e., when an assignment would require excessive unpaid inspection time at a port), he was told he could go somewhere else if he did not like it because there are other drivers to take his place. In fact, Mr. Zelaya does not have the ability to go elsewhere. He tried. When the company was not giving him many jobs, Mr. Zelaya tried to use his truck to help a friend transport cargo. When K&R became aware of this, likely through the GPS tracking system it had installed, it threatened to take away his privileges, including use of the company parking lot and diesel stations, if he did not stop.

In contrast to the above accounts, *amicus curiae* Desiree Ann Wood is an experienced, self-employed truck driver who books her own freight.[38] Before becoming a true independent contractor, Ms. Wood believes she was misclassified. She drove a company truck and could not take on additional loads for other trucking companies. She was paid by the drive mile, and could not negotiate this rate. Her former employer would send Ms. Wood on multiple jobs in a single day, each with only a short drive required. This resulted in Ms. Wood spending much of the day waiting for cargo

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[38] All information in this section is based on an interview conducted with Ms. Wood on July 10, 2018.

to be loaded or unloaded. Because her wage was tied solely to mileage, Ms. Wood was making a pittance despite working the maximum 14 hours a day allowed under Federal Motor Carrier Safety Administration regulations.[39] Despite the long hours, sometimes her take home pay was only $105.00 per day.

Eventually, Ms. Wood was forced out of the job. She applied for unemployment insurance but was denied simply because the company claimed she was classified as an independent contractor. Though she provided ample evidence that she had exercised no control of or independence in her work, the unemployment board accepted the company's classification of her without an analysis of the nature of the relationship. Ms. Wood was left without any source of income for weeks.

Currently, Ms. Wood is a true independent contractor. She is based in Florida but makes trips throughout the lower forty eight states, while contracting for a company that operates out of Delaware. This new company provides insurance for the tractor and cargo, as well as administrative support. In return, Ms. Wood gets paid up to 98% of each load rate and is able to decide which loads to accept. She can now negotiate load rates based on the ever-fluctuating rate boards. She works when she chooses, makes a living wage, and is truly independent.

Workers' rights organizations such as *amicus curiae* Wage Justice Center offer a broad perspective on

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[39] 49 C.F.R. 395.3(a)(2).

the employment relationship between a truck driver and a trucking company. Jay Shin, Directing Attorney, has represented many workers including truck drivers in class actions and other forms of litigation.[40]

Nearly half of container imports to the United States come through the Ports of Los Angeles and Long Beach ("the Ports").[41] In 2008, the Port of Los Angeles instituted the Clean Truck Program, which put in place environmental standards for all trucks entering the Ports.[42] According to Mr. Shin, most workers who had succeeded in purchasing a truck quickly learned that their trucks did not meet the Ports' new environmental standards. Unable to afford to purchase compliant trucks on their own, many drivers entered into leases with trucking companies. When a driver left a company or was fired, his or her truck remained with the company. All equity a driver had accrued in a truck became the property of the trucking company.

In Mr. Shin's view, instances of misclassification greatly increased at this time. Due to this shift in the power dynamic as a result of the Clean Truck Program, workers found themselves at the mercy of the trucking company whose truck they were leasing.

Over the five-and-a-half years the Wage Justice Center has been representing truck drivers, its attorneys have rarely if ever seen a truck driver who is truly

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[40] http://wagejustice.org/our-team/

[41] USA Today, Brett Murphy, June 16, 2017, "*Rigged. Forced into Debt. Worked Past Exhaustion. Left with nothing.*"

[42] https://www.portoflosangeles.org/ctp/idx_ctp.asp

an independent contractor, though almost all are so classified. Mr. Shin has represented many truck drivers who sleep in their trucks, unable to afford to pay rent on their take-home pay. He has had multiple owner-operator clients file for bankruptcy due to the large deductions from their paychecks for fuel, lease payments, insurance, maintenance and other business expenses.

Amicus curiae REAL Women in Trucking, Inc. has advocated for truck drivers since 2010. In addition to driving a truck full-time, Desiree Ann Wood is the President of REAL Women in Trucking, Inc. In her experience, misclassified drivers rarely see the rate board that she, as a true independent contractor, uses daily to negotiate the best rates for her loads. After paying for fuel, maintenance, taxes and other costs, many misclassified drivers make less than minimum wage. Many live in poverty despite working full-time.

II. THE LEASE-OPERATOR MANAGEMENT MODEL IS A THREAT TO GOOD EMPLOYERS, CONSUMERS AND THE ECONOMY.

A. Misclassification has contributed to a Shortage of Truck Drivers.

The misclassification of drivers like Mr. Oliveira as independent contractors is part of a broader set of labor recruitment and management practices of workers by Prime and similar firms. This constellation of practices creates a direct disadvantage to the misclassified drivers and other honest employers, and more

broadly threatens the economy by contributing to a growing shortage of truck drivers in the United States. This poses a serious threat to the nation's economy which is largely dependent on the movement of goods.

Through extensive advertising, a few dozen firms, including Prime, have established themselves as gateways to the industry for perhaps as many as 150,000-200,000 new truck driver recruits in some years.[43] Those workers are drawn to the trucking industry by the promise of a stable career and wages sufficient to support a family. While traditional employers throughout the trucking industry provide stable jobs for the bulk of truck drivers, they are now starving for labor as the entry segments of the industry, where most new truckers are initially recruited and trained, are increasingly influenced by firms like Prime who use the Lease-Operator management model.

B. The Lease-Operator Model is Growing.

Prime and similar firms use deceptive practices and government subsidies to create a revolving door for would-be truck drivers that allows them to undercut the freight rates of competitors while ensuring healthy profits.[44] Unfortunately, such strategies allow

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[43] Burks, S.V., J. Carpenter, L. Gotte, K. Monaco, K. Porter, and A. Rustichini, "*Using Behavioral Economic Experiments at a Large Motor Carrier: The Context and Design of the Truckers and Turnover Project.*" IZA Discussion Paper No. 2789 (May). Bonn, Germany: IZA, 2007.

[44] For example, for the importance of contracts to pay for training and the overestimation of workers in their potential earnings in

these firms to grow rapidly despite their driver turnover, which often exceeds 100% annually.[45] Moreover, this business model has been gaining traction, threatening to become a *requirement* of operating in certain segments due to the nature of the competition. This threatens not just Prime's competitors but the stability of the country's freight movement system, which the American Trucking Association ("ATA") forecasts is currently short more than 50,000 drivers. By 2026, the ATA expects that number to more than triple.[46]

While just 3.5 million jobs in the U.S. require workers to have a commercial driver's license ("CDL") (these include not just heavy-truck drivers, but other truck drivers and drivers of commercial passenger vehicles), there are around 10 million CDL holders currently in the US.[47] Firms like Prime have built a business model around the practice of cycling through a publicly-subsidized stream of new workers and debt peons. Some workers use public retraining grants

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making motor carriers profitable. See Hoffman, Matthew and Burks, Stephen V., *"Training Contracts, Worker Overconfidence, and the Provision of Firm-Sponsored General Training,"* May 31, 2013, available at: http://ssrn.com/abstract=2220043

[45] See Harrison, H.D. and Pierce, Julianne, *"Examining Driver Turnover and Retention in the Trucking Industry."* Center for Intermodal Freight Transportation Studies: Memphis and Nashville, March 2009.

[46] http://www.trucking.org/article/New%20Report%20Says-National-Shortage-of-Truck-Drivers-to-Reach-50,000-This-Year

[47] Costello, B. and Suarez, Rod, *Truck Driver Shortage Analysis 2015*. Arlington, VA: American Trucking Associations. October, 2015. p. 4.

intended for unemployed workers and veterans to pay for training while others become indebted to carriers and associated training schools to pay for their training.[48] Over the last two decades these firms have brought into the industry several million workers who quickly left after working as employees and living out of the trucks they operate for weeks at a time, sometimes earning less than minimum wage. These inexperienced employees are often convinced for a time that the solution to their problems is to become Lease-Operators, which, they are told, will give them greater control over their work and lives.[49]

Unfortunately, lease-operating has the opposite effect, instead placing even greater pressure on workers to work continually, sometimes for months at a time. When these workers do return home for a few days, they will end up earning very little take-home pay, many times even owing the motor carriers they work for hundreds of dollars. This outcome is a result of how firms structure their relationships with Lease-Operators. In such weeks, workers like Mr. Oliveira can easily work what most Americans would consider a full-time week of 40 hours or more and still end up *owing money* to their employer.[50]

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[48] Hoffman, Matthew and Burks, Stephen V.

[49] Viscelli, Chapter 3.

[50] See Viscelli, Chapter 4.

C. The Lease-Operator Model Negatively Impacts the Trucking Industry.

While these practices have come to set the competitive standard in some segments over the last decade or so, the negative impact of these practices has not affected traditional employers throughout much of the trucking industry until quite recently.[51] Better employers have historically enjoyed a stable workforce with very low turnover.[52] Now, as that workforce has aged and is beginning to retire at greater rates,[53] the practices of these high-turnover carriers will affect more of the industry and consumers through higher prices.[54] In short, a large portion of what should have been the nation's next generation of truck drivers has been cycled in and out of trucks under the control of firms like Prime and, as a result, has written off trucking as a place to make a career.

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[51] Longton, Linda, March 21, 2018, "*Special Report: Day of Reckoning in Driver Shortage Saga.*" Commercial Carrier Journal. https://www.ccjdigital.com/part-1-day-of-reckoning-in-driver-shortage-saga/

[52] American Trucking Associations, 2012, *Benchmarking Guide for Driver Recruitment and Retention*. Arlington VA: American Trucking Associations.

[53] Costello, Bob, *Truck Driver Shortage Analysis 2017*, October 2017. Arlington VA: American Trucking Associations.

[54] Large firms are already experiencing much higher freight costs, for example see: https://money.cnn.com/2018/05/14/news/companies/truck-drivers-freight-costs/

III. THIS COURT SHOULD NOT FOSTER MISCLASSIFICATION OF DRIVERS BY PERMITTING EMPLOYERS WHO MISCLASSIFY DRIVERS TO REQUIRE RESOLUTION OF DISPUTES THROUGH ARBITRATION UNDER THE FAA.

Workers who must arbitrate their claims are 59% less likely to win than those who take their case to federal court and 38% less likely to win than workers litigating in state courts.[55] The median award in mandatory arbitration is 21% of the median award in the federal courts and 43% of the median award in the state courts.[56]

Because arbitration clauses typically now include a bar to collective enforcement, it will be difficult for workers to bring the issue of misclassification in the trucking industry forward. Since arbitration awards are not normally reviewable on appeal, and have no *stare decisis* effect, arbitration will not be an effective tool for remedying the widespread abuse caused by misclassification in the trucking industry.

Employers who misclassify employees stand to gain significantly by using forced arbitration to resolve disputes. This Court should not read the FAA in a way that allows them to require arbitration of disputes about the nature of employment in the industry.

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[55] Economic Policy Institute Report: https://www.epi.org/files/2015/arbitration-epidemic.pdf pm19-20

[56] *Ibid.*

CONCLUSION

The judgment for the Court of Appeals for the First Circuit should be affirmed.

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No. 17-340

IN THE

Supreme Court of the United States

NEW PRIME, INC.,

Petitioner,

v.

DOMINIC OLIVEIRA.

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* SENATOR SHELDON WHITEHOUSE IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae is United States Senator Sheldon Whitehouse of Rhode Island. As a legislator and member of the Senate Committee on the Judiciary, *amicus* has a front-row view of both the virtues of America's constitutional democracy and the hazards of growing corporate influence over its democratic institutions, including the judiciary.

As a former state attorney general and United States Attorney, *amicus* holds a deep respect for the role of the jury in the American justice system. *Amicus* files this brief to draw attention to the Court's steady march of decisions eroding the Constitution's Seventh Amendment protections and to warn of the Court's perilous destabilization of its own institutional reputation.

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[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or his counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

For years the civil justice system has suffered under a sustained attack by corporations and billionaires, and by the front groups they stand up to mask their identities in this effort. These are powerful entities, with enormous sway in the legislative and executive branches. They resent the plane of equality they must stand on in courts, and fear the disclosures that document discovery, depositions, and testimony under oath produce. They therefore desire to reduce their exposure to courtrooms.

Over the past decade, a predictable conservative majority of the Supreme Court has handed down an accommodating string of 5-4 decisions closing off ordinary citizens' pathways to the courtroom. Corporate victories at the Supreme Court have undermined civil litigants' constitutional right to have their claims heard before a jury of their peers, and have whittled to a nub the protective role courts and the jury system were designed to play in our society. Such victories have allowed corporations to steer plaintiffs out of courtrooms and into arbitration, where the odds can be stacked in favor of big business. The Court's recent arbitration decisions regarding the Federal Arbitration Act of 1925 ("FAA"), aggrandizing its reach and undermining the original purpose of the Seventh Amendment, are an example.

Protected by the Seventh Amendment, the civil jury has a dual role in the American constitutional

system. In its day-to-day role, the civil jury decides the facts and assigns fault in matters ranging from property disputes between neighbors to high-stakes lawsuits involving corporate behemoths. But that's not all it does.

The Founders had more in mind for this institution of government when they protected the civil jury in our Constitution's Bill of Rights. Alexis de Tocqueville observed that the jury should be understood as "one mode of popular sovereignty." Alexis de Tocqueville, *Democracy in America* 311 (Arthur Goldhammer trans., Penguin Putnam 2004). Jury service gives citizens direct exercise of an American constitutional power.

In a Constitution often dedicated to protecting the individual citizen against abuse of government power, the civil jury is the element of our constitutional system that is also dedicated to protecting citizens from abuse by private wealth and power. The Founders knew all too well the influence of moneyed elites, and left us the hard square corners of the jury box as a bastion against "the encroachments of the more powerful and wealthy citizens." 3 William Blackstone, Commentaries on the Laws of England 380 (1st ed. 1768).[2]

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[2] Political history can be viewed through the lens of a long struggle between powerful interests seeking to control the levers

of government and ordinary individuals seeking mostly to be left alone. *See, e.g.*, Niccolo Machiavelli, The Prince, ch. IX (1513) (speaking of "two distinct parties" in a governed society: one, "the nobles [who] wish to rule and oppress the people," and two, "the people [who] do not wish to be ruled nor oppressed by the nobles"); Andrew Jackson, Veto Message Regarding the Bank of the United States (July 10, 1832), http://avalon.law.yale.edu/19th_century/ajveto01.asp (distinguishing between "the rich and powerful [who] too often bend the acts of government to their selfish purposes" and the "humble members of society — the farmers, mechanics, and laborers — who have neither the time nor the means of securing like favors to themselves"). The former desire to weaken bothersome institutional safeguards against corruption; the latter need the protection of those safeguards, even perhaps without knowing so. It is important that institutions of government recognize this perennial corruption hazard, and affirmatively protect against the persistent coopting of government by powerful and wealthy influencers.

In the past, this Court has taken this responsibility deadly seriously, and particularly has recognized the co-opting and corrupting tendencies of corporate power. *See Marshall* v. *Baltimore & Ohio Railroad Co.*, 57 U.S. 314, 335 (1853) ("Influences secretly urged under false and covert pretenses must necessarily operate deleteriously . . . . The use of such means and such agents will have the effect to subject the state governments to the combined capital of wealthy corporations, and produce universal corruption[.]"); *Standard Oil Co. of New Jersey* v. *Lee*, 221 U.S. 1, 83 (1901) (Harlan, J., concurring in part and dissenting in part) (noting that in 1890, "the conviction was universal that the country was in real danger from another kind of slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country[.]"); *Louis K. Liggett Co.* v. *Lee*, 288 U.S. 517, 549 (1933) (Brandeis, J., dissenting) ("There was a sense of some insidious

Of course, one means of such encroachment by "the more powerful and wealthy citizens" is through corruption and abuse of government. In this sense, the civil jury's protection of the ordinary citizen against abuse by private actors supplements the various institutions protecting the ordinary citizen against abuses of government power. In a world in which unchecked special interest influence leads so plainly to corruption and abuse, the Founders set juries as the institution of government most resistant to political influence.

Against this historical and constitutional backdrop, the corporate campaign against the civil jury has an obvious motive: that "the more powerful and wealthy" should not have to suffer the indignity of a fair proceeding. In legislatures, platoons of lobbyists and floods of money (now both unlimited and anonymous) assure advantage for "the more powerful and wealthy." In the executive branch, phalanxes of lawyers and well-oiled revolving doors have for

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menace inherent in large aggregations of capital, particularly when held by corporations."); *see also Baltimore & Ohio Railroad*, 57 U.S. at 329 ("The right of choosing an impartial tribunal is a privilege of no small practical importance, and more especially in cases where a distant plaintiff has to contend with the power and influence of great numbers and the combined wealth wielded by corporations in almost every State.").

decades made agency capture a well-documented phenomenon giving advantage to "the more powerful and wealthy." Big influencers can become readily habituated to such advantage. It is a tragedy that, despite the extensive history and despite their obvious motive, this corporate campaign has succeeded, leaving so many Americans without redress, and virtually extirpating the civil jury from our American system of government.[3]

This should not be. The very annoyance of the "more powerful and wealthy" that they should be subjected to equality in the courtroom; the very intensity of their desire to divert conflicts away from juries to forums where their power and wealth gives them more advantage — these are predictable and positive attributes of the civil jury's role as the element of government designed to resist "the encroachments of the more powerful and wealthy citizens." These complaints are not a reason to assist in that diversion. This Court should not — now or

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[3] Since the 1930s, the number of jury trials has plunged precipitously, with less than two percent of federal civil cases and under one percent of state civil cases reaching a jury. *See* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 Yale L.J. 522, 524 (2012); Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 Wm. & Mary L. Rev. 1241, 1265 (2014) (discussing the startling statistics of diminishing jury trials and implications for their role in our political system).

ever — be a party to degrading a constitutional element of government just because that element's proper operation provokes yawps of complaint from "the more powerful and wealthy citizens" whose "encroachments" it was designed to restrain. To disable an element of our Constitution because it is *not* working would be a daring task indeed; to disable it because it *is* working would be anathema.

The Seventh Amendment is not the only element of our legal system under threat here: the Court's fundamental role as a neutral decision maker — as an impartial arbiter of law — is in question. Polls show Americans believe corporations enjoy advantage in this Court, by a margin of 7-1 over those who believe individuals enjoy advantage. *See* The Mellman Group, Inc., *Winning Messages: On Judges, Guns and Owning the Constitution's Text, History & Values* (Poll for the Constitutional Accountability Center) (Sept. 2017), https://www.theusconstitution.org/sites/default/files/-Mellman-CACConstitution-Poll September2017.pdf. That public perception seems founded in cases like this one, where in apparent contradiction of its own rules, the Court granted certiorari absent any circuit conflict on the central question presented and despite the lower courts' adherence to the clear text of the statute. *See* 6 Sup. Ct. R. 10.

Stacked atop the array of recent decisions that meticulously undermine the civil jury and allow

"powerful and wealthy citizens" to strip ordinary citizens of redress in court, this grant of certiorari has the same seeming inevitability as those 5-4 decisions in cases preceding it. Accordingly, *amicus* fears that the outcome of this case may be preordained — not by the FAA's plain language, but instead by the trajectory of the recent pattern of 5-4 partisan decisions (decisions in which the Court divides 5-4 with the Republican-appointed majority voting as a bloc). With numbingly predictable inevitability, these cases seem to be won by the "more powerful and wealthy" corporate citizens.

Against judicial doctrine that emphasizes the primacy of *text* in interpreting the laws of Congress, this case — and the incontrovertibly plain meaning of the FAA's saving clause — presents an easy test of the Court's commitment to that black-letter interpretive principle.

ARGUMENT

I. A Clear Policy Preference Has Emerged for Denying Citizens Their Day in Court.

Any fair reading of the Supreme Court's 5-4 jurisprudence in the past decade shows a distinct pattern of the "more powerful and wealthy" corporate interests gaining precedence over ordinary citizens. A pro-corporate policy bent has been particularly evident in the aggressive judicial expansion of the

Federal Arbitration Act of 1925 ("FAA"). The recent string of 5-4 arbitration decisions has provided the "more powerful and wealthy" interests an avenue to systematically deny ordinary individuals, such as those who are their employees or customers, access to juries of their peers when wronged. This was not what Congress intended when it enacted the FAA.

Congress passed the FAA "to place arbitration agreements upon the same footing as other contracts," *E.E.O.C.* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002), specifically in the context of *commercial* disputes. *See, e.g., Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612, 1644 (2018) (Ginsburg, J. dissenting) (citing 65 Cong. Rec. 11080 (1924)) (remarks of Rep. Mills) ("This bill provides that where there are commercial contracts and there is disagreement under the contract, the court can [en]force an arbitration agreement in the same way as other portions of the contract."). Looking at "the records of the deliberations in Congress" taking place during the years prior to the Act's passage, it is clear that there were serious questions about whether Congress intended to apply the FAA to "agreements affecting employment." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 126 (2001) (Stevens, J., dissenting). Likewise doubtful was Congress's intention to see the FAA applied to agreements between parties with "unequal bargaining power." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 42 (1991) (Stevens, J., dissenting); *see also id.* ("In

recent years, however, the Court 'has effectively rewritten the statute[.]'"); Judge Craig Smith & Judge Eric V. Moye, *Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts*, 44 Tex. Tech L. Rev. 281, 287–88 (2012).

The early judicial expansion of the FAA began in *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), when this Court ruled that consumers seeking to challenge the terms of their arbitration agreements could have their claim heard in court only if the claim challenged the enforceability of the arbitration clause itself. *See id.* at 403–04. Then, "[i]n 1983, the Court declared, for the first time in the FAA's then 58-year history, that the FAA evinces a 'liberal federal policy favoring arbitration.'" *Epic Systems*, 138 S. Ct. at 1643 (Ginsburg, J., dissenting) (citing *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The Court further ballooned the statute in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), when it permitted arbitration clauses to be enforced in claims arising under the Age Discrimination in Employment Act of 1967, a workplace antidiscrimination statute.

But the greatest reach has come in the past decade. This Court, along consistent 5-4 partisan appointment lines, has rolled back plaintiffs' rights to plead their claims in court at a new and alarming clip.

In *Rent-A-Center* v. *Jackson*, 561 U.S. 63 (2010), the Court held 5-4 that would-be litigants could not bring a claim challenging an arbitration agreement as unconscionable — they would have to address the unfairness of the agreement before the very arbitrator they disputed. *See id.* at 69–72. Time will likely side with Justice Stevens in his dissent: "[c]ourts may now pluck from a potentially invalid arbitration agreement even narrower provisions that refer particular arbitrability disputes to an arbitrator. . . . I do not think an agreement to arbitrate can ever manifest a clear and unmistakable intent to arbitrate its own validity." *Id.* at 85 (Stevens, J., dissenting). Surely Congress did not intend this result. Yet that is what the Court created.

Less than a year later, in *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011), the Court, 5-4, prevented consumers from bringing class-action suits against corporations for low-dollar, high-volume frauds. Ruling that the FAA preempted a state law prohibiting class action waivers in arbitration agreements, the Court left injured plaintiffs no alternative but to pursue individual arbitration claims. *See id.* at 346–49. The Court deprived individuals of their only economically viable way to pursue malefactors for low-dollar, high-volume frauds, leaving corporations free to pursue such practices unchecked by the threat of collective consumer action. *See, e.g.*, *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015). *Concepcion* has

wrought havoc on the American consumer, insulating corporate wrongdoers from meaningful liability.

In *American Exp. Co.* v. *Italian Colors Restaurant*, 570 U.S. 228 (2013), the Court struck again, this time 5-3 (the 5 again being all the Republican appointees), dispensing with the rule — established by a long line of Supreme Court precedent — that contractual arbitration clauses are enforceable only if they permit individuals to effectively vindicate their rights. As Justice Kagan put it in dissent, the opinion was a "betrayal" of precedent. *Id.* at 240 (Kagan, J., dissenting). The effect was "to chok[e] off a plaintiff's ability to enforce congressionally created rights." *Id.* In dismissing that precedent, the majority "barely trie[d] to explain why it reache[d] a contrary result." *Id.*

And last term, *Epic Systems*, 138 S. Ct. 1612 (2018), another 5-4 partisan decision, further diminished employees' right to join their individual claims in the courtroom, allowing the FAA to swallow the National Labor Relations Act so that employment contracts can force employees to waive statutory labor rights.

* * * *

Beyond its infidelity to the text and purpose of the FAA, this Court's recent 5-4 arbitration jurisprudence flies in the face of the Seventh Amendment right to a jury trial. To English legal scholars, such as Sir

William Blackstone, the "trial by jury" was the "glory of the English Law." 3 William Blackstone, Commentaries on the Laws of England 379 (1st ed. 1768). Blackstone urged his readers to "guard with the most jealous circumspection against the introduction of new and arbitrary methods of trial, which . . . may in time imperceptibly undermine this best preservative of English liberty." *Id.* at 381. In words that ring true today, he explained:

> [T]he most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial . . . . This therefore preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens.

Id. at 380. *Amicus* does not need to tell the Court how important Blackstone's Commentaries were to the lawyers of the founding generation.

History tells the same lesson. America's earliest settlers established trial by jury in the new colonies. *See* Stephen Landsman, *The Civil Jury in America: Scenes from an Underappreciated History*, 44

Hastings L.J. 579, 592 (1993) (citations omitted). Interference with the jury right was a *casus belli* of the Revolution. *See* The Declaration of Independence para. 20 (U.S. 1776) (decrying "depriving [the colonists] in many Cases, of the Benefits of Trial by Jury"). When the first draft of the Constitution was silent on the civil jury, Americans sounded the alarm and the Seventh Amendment was passed in the Bill of Rights — enshrining the civil jury right into the Constitution. Alexander Hamilton described the importance of juries in Federalist No. 83:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.

Alexander Hamilton, *The Federalist No. 83*, at 499 (Clinton Rossiter ed., 1961).

Reverence for the civil jury continued well after ratification of the Seventh Amendment. Justice Joseph Story wrote that the Seventh Amendment is "most important and valuable" and "places upon the high ground of constitutional right the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is

conceded by all to be essential to political and civil liberty." Joseph Story, 2 Commentaries on the Constitution of the United States 574 (The Lawbook Exch., Ltd. 2001) (3d ed. 1858). Chief Justice William Rehnquist later wrote: "[t]he founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 343 (1979).

Reading the Court's FAA jurisprudence, it is as if none of this background existed. This Court's 5-4 partisan decisions have increasingly given our most "powerful and wealthy" entities new statutory tools to strip away this right from individual employees and customers, with nary even a mention of the Seventh Amendment, let alone any presumption in favor of American citizens getting their day in court.[4]

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[4] In fact, the Court has not considered the Seventh Amendment in its arbitration jurisprudence in more than *sixty* years — it last expressed concern in 1956 that moving people "from a court of law to an arbitration panel may make a radical difference in [the] ultimate result [as a]rbitration carries no right to trial by jury that is guaranteed . . . by the Seventh Amendment." *Bernhardt* v. *Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956).

II. This Court Compromises Its Legitimacy When It Jettisons Neutral Principles to Reach a Desired Outcome.

There is nothing more essential to the legitimacy of the judiciary than its apolitical role in our constitutional system. Indeed, Chief Justice Roberts expressed concern last term about the Court's "status and integrity" if it were to continually adjudicate partisan disputes:

> If you're the intelligent man on the street and the Court issues a decision, and let's say, okay, the Democrats win, and that person will say: 'Well, why did the Democrats win?' . . . It must be because the Supreme Court preferred the Democrats over the Republicans. . . . And that is going to cause very serious harm to the status and integrity of the decisions of this Court in the eyes of the country.

Gill v. *Whitford*, No. 16-1161, Oral Arg. Tr. at 37:18-38:11 (Oct. 3, 2017), *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1161_mjn0.pdf.[5] But the perception of

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[5] This concern did not go unnoticed by commentators who closely follow the Court. *See, e.g.*, Linda Greenhouse, *Will Politics Tarnish the Supreme Court's Legitimacy?*, N.Y. Times

the Court as an apolitical institution is already in doubt.[6]

To curb this erosion of confidence, *amicus* recommends that this Court renew its commitment to the neutral principles of adjudication that shield it from political bias.

(Oct. 26, 2017), *available at* https://www.nytimes.com/2017/10/26/opinion/politics-supremecourt-legitimacy.html; Lawrence Friedman, *John Roberts has tough job of keeping faith in Supreme Court*, The Hill (Oct. 26, 2017), *available at* http://thehill.com/opinion/judiciary/357392-john-roberts-has-task-of-keeping-americas-faith-in-supremecourt.

[6] A great many Americans believe that the Court is already politicized. *See, e.g.*, Brandon L. Bartels & Christopher D. Johnston, *Political Justice?: Perceptions of Politicization and Public Preferences Toward the Supreme Court Appointment Process*, 76 Pub. Op. Quarterly 105, 110, 112 (2012) (In a survey of 1,500 Americans, "[r]oughly 70 percent of the mass public either agrees or strongly agrees that the Supreme Court is 'too mixed up in politics' and 'favors some groups more than others,'" and "about 64 percent of the public believes the Court is 'sometimes politically motivated in its rulings.' . . . [A] significant share of the American public perceives of the Court in politicized terms."); James L. Gibson & Michael J. Nelson, *The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms, and Recent Challenges Thereto*, 10 Ann. Rev. L. & Soc. Sci. 201, 210–11 (2014) ("[P]ublic beliefs that justices decide cases on the basis of ideology, rather than law, raise a potential threat to the legitimacy of the institution. . . . [L]egitimacy seems to flow from the view that discretion is being exercised in a principled, rather than strategic, way.").

Principles of justiciability are a critical guardrail that keep the judiciary in its constitutionally prescribed lane. "[A] judge . . . is not [a] knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness." Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (Yale Univ. Press 1921). Such principles also provide necessary stability and predictability. Troublingly, this case's path to the Court may cause "the intelligent man on the street" to suspect there is something else going on beyond adherence to those neutral principles. This Court's practice is to withhold judgment unless important issues of federal law are so intractably difficult that lower courts are unable to reach the same result. That practice is enshrined in the Court's own rules, which provide that in considering a petition for certiorari, the Court hears cases where the decision below conflicts with another appellate court or a state supreme court. *See* 6 Sup. Ct. R. 10.

Yet here there is no conflict among the appellate circuits (or any lower courts) on the central question presented. The First Circuit is the first federal Court of Appeals to rule on whether the phrase "contracts of employment," as used in the FAA, should be given its plain meaning to encompass all agreements to perform work. There is no other appellate decision on the question. While this issue is currently pending before other circuits, there is no reason to believe that those courts will depart from the First Circuit's adherence to the FAA's clear text. This case has no

apparent business before the Supreme Court. But here we are.

Furthermore, the plain language of the statute would appear to resolve this case. The FAA prohibits courts from applying the statute to the "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Since the statute's inception, this text has been crystal clear: a transportation worker's agreement to perform work is exempted. The Court's inquiry should end there. "The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Star Athletica, L.L.C.* v. *Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017).

Neutral principles of judicial restraint and statutory interpretation provide an easy answer to this case. First, the case was improvidently granted because there is no circuit split. Second, a plain reading of the text dictates that two lower courts got it right. Departing from these self-evident conclusions would put the Court under both a burden of explanation and a cloud of suspicion.

CONCLUSION

For the foregoing reasons, and those in Respondent's brief, the Court should dismiss the case

as improvidently granted or affirm the First Circuit's decision.

Respectfully submitted,

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